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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

—v.—

ROBBINS & MYERS, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In the

Supreme Court of the United States

October Term, 1975

No. 75-.....

Dortha Allen Guy,

Petitioner,

—v.—

Robbins & Myers, Inc.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on October 24, 1975, rehearing and rehearing en banc having been denied December 9, 1975.

Opinions Below

The decision of the United States Court of Appeals for the Sixth Circuit and the order denying the petitions for rehearing and rehearing en banc of the petitioners herein, reported at 525 F.2d 124, are reprinted *infra* at 11a and 23a.[1] The memorandum opinion and order of the United States District Court for the Western District of Tennessee dismissing plaintiff's action and its order adhering thereto on reconsideration, reported at 8 E.P.D. ¶¶ 9573 and 9574, are reprinted *infra* at 1a and 6a, respectively.

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[1] This form of citation is to pages of the Appendix.

Jurisdiction

The judgment and opinion of the Court of Appeals was entered on October 24, 1975. The petitioner's petition for rehearing and rehearing en banc were denied on December 9, 1975. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Question Presented

Petitioner's employer discharged her on October 25, 1971. On October 27, 1971, a union grievance was filed on her behalf, which was denied on November 18, 1971. February 10, 1972, 108 days after her discharge, but only 84 days from denial of her grievance, petitioner filed a Title VII charge with the Equal Employment Opportunity Commission alleging racial discrimination.

Did the Court of Appeals err in dismissing this Title VII action on the ground that the charge which petitioner filed with the EEOC was untimely?

Statutory Provisions Involved

Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 241, 260, 42 U.S.C. § 2000e-5(d) (1970), before its amendment in 1972, read as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days

after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The same provision, as amended by Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, and renumbered Section 706(e), 42 U.S.C. § 2000e-5(e) (Supp. II 1972), reads as follows:

"(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with in State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113, reads as follows:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter.

Statement of the Case

The petitioner, Dortha Allen Guy, brought this action under Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e et seq., and the Civil Rights Act of 1866, 42 U.S.C. § 1981. Mrs. Guy's complaint, brought against her former employer, respondent Robbins & Myers, Inc. (the Company), and her labor union, Local 790 of the International Union of Electrical, Machine and Radio Workers (the Union), alleged that the Company had discriminated against her because of her race (black), both in discharging her and in failing to reinstate her, and that the Union had not fairly represented her in grievance proceedings.

Mrs. Guy was discharged from her employment on October 25, 1971. Two days later, on October 27, 1971, she caused a grievance to be filed on her behalf,[2] pursuant to the provisions of the collective bargaining agreement between the Company and the Union. The grievance stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time." It was unsuccessfully carried through the third step of the

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[2] Plaintiff was absent from work from October 24, 1971 until October 29, 1971, and thus was not present on the day of her discharge. One of her co-workers filed the grievance on her behalf. When plaintiff returned to work on October 29, 1971, she immediately began personally processing the grievance through the various steps of the grievance-arbitration process.

grievance process, where it was denied in writing by the Company's Personnel Director on November 18, 1971. The denial simply stated that the appellant had been rightfully discharged. Plaintiff did not press this grievance beyond the third step, and the Union accordingly did not take appellant's claim to arbitration.[3]

On February 10, 1972, 108 days after her discharge but only 84 days following the denial of her grievance, Mrs. Guy filed a charge with EEOC, alleging racial discrimination in her discharge. EEOC accepted and processed her charge, and informed her on November 20, 1973 that it had found no reasonable cause to believe that her discharge was racially motivated[4] and giving her formal notice of her rights to sue under Title VII. She then instituted an action against the Company and the Union in the United States District Court for the Western District of Tennessee.

However, by Order of June 12, 1974, the District Court granted the Company's motion to dismiss[5] plaintiff's Title VII allegations on the ground that plaintiff had not filed her charge of discrimination within the 90-day period pre-

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[3] The four steps provided for in the Collective Bargaining Agreement (Article XVIII-Grievance Procedure) follow lines that are fairly common in such agreements. Step 1 provides for proceedings between the employee and his foreman, Step 2 between the Chief Steward and the General Foreman, Step 3 between the Union Officers and representatives of Management, and Step 4 for arbitration.

[4] A finding of no reasonable cause is not a bar to a Title VII action. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48, n. 8 (1974).

[5] The district court had earlier dismissed the case, insofar as it was grounded on 42 U.S.C. § 1981, because of the applicable Tennessee statute of limitation.

scribed by Section 706(d) of the Civil Rights Act of 1964 before its amendment in 1972. The Court further held that the 90-day period had not been tolled during the processing of her grievance (1a-5a). On June 19, 1974, the District Court refused to modify its prior holdings (6a-10a).

Subsequently, the defendant Union was realigned as a party plaintiff, Mrs. Guy and the Union filed timely Notices of Appeal to the United States Court of Appeals for the Sixth Circuit, and EEOC appeared in support of their appeal as amicus curiae.

The Court of Appeals affirmed the dismissal of the complaint on October 24, 1975, by a 2-1 vote (11a-22a) and denied petitioner's petition for rehearing and rehearing en banc on December 9, 1975 (23a).

The Court of Appeals (1) held that Mrs. Guy by filing her Union grievance did not toll the running of the Title VII statute of limitations for filing a charge with the EEOC; (2) implicitly held that the statute of limitations for filing a charge with the EEOC began to run on the day that petitioner was initially dismissed, even though the company's decision did not become final until the completion of the grievance process; and (3) held the 1972 amendments to Title VII, insofar as they extended the period for filing EEOC charges from 90 to 180 days, should not be applied to cases which arise before the amendment but which were still pending on the effective date of those amendments.

Reasons for Granting the Writ

The question presented raises three important issues concerning the implementation of Title VII by the courts and by the EEOC. The Sixth Circuit's decision regarding each of these issues is in conflict with the decisions of other courts of appeals. All three of the issues in conflict are now directly before the Court in *McDonald* v. *Santa Fe Transportation Company*, No. 75-260, *cert. granted*, 46 L.Ed 2d 248 (Nov. 3, 1976).[6] The issue in conflict concerning the application of the 1972 amendments to litigation pending as of the effective date of those amendments is before this Court in a closely analogous form in *Brown v. General Services Administration*, No. 74-768, *cert. granted*, 421 U.S. 987 (1975) and *Place* v. *Weinberger*, No. 74-116, *cert. denied*, 419 U.S. 1040 (1974), Petition for Rehearing pending.[7]

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[6] In order to reach the question presented in *McDonald*, whether a white employee may raise a claim of race discrimination under Title VII, it must be determined that the statutory period for filing a charge with the EEOC was tolled pending grievance proceedings and that the 1972 amendment to Title VII extended the period of time within which to file a charge with the EEOC from 90 to 180 days to all pending litigation. See Brief *Amicus Curiae* of the NAACP Legal Defense and Educational Fund, Inc., at p. 2.

If the Court determines either that the statute of limitation is tolled during the processing of a grievance or that the 180 day provision applies to pending charges, then the *Guy* decision must be reversed.

[7] Both *Brown* and *Place* present the question, *inter alia*, whether the 1972 amendments to Title VII, insofar as they create new remedies for federal employees, should be applied to cases still pending on the date when the amendments become effective.

I.

The Decision Below Is in Conflict With the Decisions of Other Courts of Appeals on the Same Matters.

A.

The Sixth Circuit's holding that the filing of a union grievance does not toll the running of the time period for filing a Title VII charge conflicts with decision of three other circuits.[8] The Fifth,[9] Ninth[10] and Tenth Circuits[11] have all held that the time within which an aggrieved person might file Title VII charges with EEOC

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[8] In this case the Sixth Circuit held "[i]t would therefore appear to us to be utterly incongruous for us to hold that a federal statute which contains jurisdictional prerequisites for the exercise of its remedies is tolled by the mere filing of a grievance under a collective bargaining agreement". 17a and 525 F. 2d at 128.

[9] "We, therefore, hold that the statute of limitations . . . is tolled once an employee invokes his contractual grievance remedies in a constructive effort to seek a private settlement of his complaint." (footnote omitted) *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888, 891 (5th Cir. 1970); see also *Hutchings* v. *United States Industries, Inc.*, 428 F.2d 303, 312 (5th Cir. 1970).

[10] "Since Title VII seeks to utilize private settlement as an effective deterrent to employment discrimination, we hold that the 210-day statute of limitations is tolled while an employee in good faith pursues his contractual grievance remedies in a constructive effort to obtain a private settlement". *Malone* v. *North American Rockwell Corporation*, 475 F.2d 799, 781 (9th Cir. 1972).

[11] *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974). In *Sanchez*, which was decided after *Alexander* v. *Gardner-Denver Corp.*, 415 U.S. 36 (1974), the Tenth Circuit argues that the tolling rule was "in tune with the construction given by the Supreme Court and other federal courts to this kind of provision," *id.* The Tenth Circuit's interpretation of the applicable Supreme Court decisions contradicts the interpretation of the Sixth Circuit, 17a and 525 F.2d at 128.

was tolled for the preiod during which contractual grievance proceedings were being pursued.[12]

B.

There is an additional, related, but slightly different, conflict between the court below and the Seventh Circuit. The Sixth Circuit implicitly held that the period of limitations commences from the date of the discharge, rather than the date on which grievance proceedings ended and the company's decision to fire Mrs. Guy became final. In *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972), the court took the opposite approach, and computed the statutory period within which charges might be filed with EEOC from the date on which grievance proceedings concluded.[13] Id. at 826-27 and n. 40.

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[12] The court below characterizes the 90-day limitation period on filing of charges with EEOC as an integral part of the right created by Title VII rather than as a statute of limitations subject to such equitable considerations as tolling in appropriate situations. This interpretation is inherently in conflict with the decisions of the Fifth, Ninth and Tenth Circuits cited above, as well as with the Seventh Circuit case of *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (1972), referred to below. This characterization was also specifically considered and rejected in *Reeb* v. *Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 929 (1975), and seems totally inconsistent with the decision of this Court in *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

[13] Although perhaps technically not a holding of the court, since the computation led to the conclusion that despite the extension of the period during which he might have filed, the plaintiff was nevertheless too late, the opinion clearly established the law of the Seventh Circuit on the subject.

See also *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F. Supp. 533, 538 (S.D. W. Va. 1972), affirmed w.o. op., 474 F.2d 1342 (4th Cir. 1972), treating the statutory time as starting to run upon the conclusion of the grievance proceedings, but dismissing the charge on other grounds. The analysis adopted in *Moore* v. *Sunbeam Corp., supra,* had also been advanced in *Culpepper* v. *Reynolds Metals Co., supra,* but not passed upon in that case because the decision that the limitation had been tolled made it unnecessary to do so. 421 F.2d at 893, n. 5. *See also, Malone* v. *North American Rockwell Corp., supra,* 457 F.2d at 781, n. 2.

The approach of the Seventh Circuit in *Moore* is in turn in conflict with the decisions of the Fifth, Ninth and Tenth Circuits. Under the tolling approach of the Fifth, Ninth and Tenth Circuits the statute would have been tolled during the 22 days of Mrs. Guy's grievance proceedings, from October 27 through November 18, 1971. Since Mrs. Guy filed her charge on the 108th day after her discharge, her charge under this approach would have been construed as being filed on the 86th day and therefore timely. If the Seventh Circuit approach had been applied, the statute would have started running on November 18, 1971 (the date of the final resolution of the grievance). The filing by Mrs. Guy of an EEOC charge on February 10, 1972, 84 days later, would have again been held timely. Thus, if the Sixth Circuit had followed either of the alternatives adopted by the other circuits, Mrs. Guy's complaint would not have been dismissed. However, the conflict between the approaches of the Seventh Circuit and that of the Fifth, Ninth and Tenth Circuits, may sometimes cause a different result. For example, if Mrs. Guy had filed her charge on February 15, 1972 (rather than February 10, 1972), the charge would have been construed as being filed on the 89th day pursuant to the approach of the Seventh Circuit and thereby timely; however, pursuant to the approach of the Fifth, Ninth and Tenth Circuits the charge would have been construed as being filed on the 91st day and thereby untimely.

C.

The court of appeals also refuses to apply to this case the 1972 amendments to Title VII, even though this case was still pending on the date when the amendments became effective (17a, 525 F. 2d at 128). The 1972 amendment extended the period in which an EEOC charge must be filed from 90 to 180 days, 42 U.S.C. 2000e-5(e). As Judge Ed-

wards noted in his dissent (19a-20a), this decision is squarely in conflict with the decision of the Ninth Circuit in *Davis* v. *Valley Distributing Co.*, 522 F. 2d 827 (1975), which held that the 180-day rule must be applied to such pending cases. The decision in the instant case, is clearly inconsistent with the rule reaffirmed by this Court in *Bradley* v. *School Board of the City of Richmond*, 416, U.S. 696, 711 (1974), "that a court is to apply the law in effect at the time it renders its decision, unless there doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." [14]

The decision in this case as to the applicability of the 1972 amendments to pending charges is also inconsistent with *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), where this Court refused to apply technicalities, such as a formalistic double filing of charges of discrimination, to the procedures which are undertaken by laymen under Title VII.[15]

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[14] Here the statute specifically mandates the application of the amendments to pending charges, Section 14 of the Equal Employment Opportunity Act of 1972; 86 Stat. 103, 113.

The question of the applicability of the 1972 amendments to previously filed charges is independently important, in the light of the huge number of charges that were being filed every year with EEOC, and the large backlog of charges on which EEOC had not completed processing and which were still pending at the time of the enactment of the amendments. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 3 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 6 (1971).

[15] *Cf. Love* v. *Pullman Co.*, 404 U.S. 522 (1972), in which a charge had been filed prematurely with EEOC before submission to a state anti-discrimination agency, contrary to the statutory requirement that where there was such a state agency charges were to be filed with EEOC only after the expiration of certain time periods following filing with the state agency. After completion of the state proceedings, EEOC assumed jurisdiction over the charge without requiring a second filing, and this Court upheld its practice. The Court stated:

> . . . To require a second "filing" by the aggrieved party after termination of state proceedings would serve no purpose other

In both the instant case and the *Davis* case, the plaintiffs were discharged more than 90 but less than 180 days before they filed charges with EEOC. In both cases, charges were filed before March 24, 1972, the effective date of the 1972 amendments to Section 706 of the 1964 Act (the section including the time requirements for filing of charges with EEOC). In both cases the discharge had occurred less than 180 days before March 24, 1972; therefore in both cases, if the plaintiffs had engaged in the ridiculously superfluous act of re-filing with EEOC on or shortly after March 24, 1972, their position would have been immune to challenge. The Ninth Circuit, in the *Davis* case, refused to stultify the law by holding that an aggrieved party would forfeit his claim by failing to file a second, redundant charge.[16] The Sixth Circuit, in the instant case, held the opposite way.

II.

The Case Presents an Important Question of Federal Law Which Should Be Settled by This Court.

This case involves important and frequently recurring questions arising out of the interrelationship between the Congressional policies forbidding employment discrimination and those encouraging utilization of grievance-arbitration procedures.

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than the creation of an additional procedural technicality, such technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process. (404 U.S. at 526-27)

[16] We should point out that *Davis* might be distinguished on the ground that there was a technical new "filing" by EEOC itself of plaintiff's late charge following remand from a state agency, just before March 24, 1972. But this scarcely weakens the main thrust of the *Davis* holding, that the retroactive provision in the 1972 amendments was intended to apply, *inter alia*, to previously filed charges, thus modifying the time within which those charges had to be filed with EEOC.

The conflict among the circuits is an irresistible invitation to forum-shopping. The venue provision of Title VII provides that a suit may be filed in several alternative jurisdictions.[17] Until this Court acts, Title VII plaintiffs will, or will not, lose their Title VII rights depending not only on the happenstance of the state in which they work, but also depending on the resourcefulness of their lawyer to select the jurisdiction with the "proper" tolling decisions.[18] Because many major employers and unions operate nationwide, venue often exists in several different circuits.[19]

This conflict poses serious administrative problems for the EEOC. The EEOC must apply different rules as to whether a charge should be deemed timely and accepted according to the circuit involved. Where, as is common, venue would lie in several different circuits with different rules, the EEOC will have to resolve complex problems of conflict of laws. EEOC has heretofore repeatedly held that the statutory limitations on the time within which charges

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[17] The plaintiff may bring his Title VII action in the district where the unlawful act is alleged to have been committed, where plaintiff would have worked but for the alleged practice or where employment records pertaining to the unlawful practice are maintained and administered, or if the putative employer or union is not found within any such district, a Title VII action may be brought within the judicial district in which he has his principal office, 42 U.S.C. §2000e-5(f).

[18] Of course, counsel may devise many theories for selecting the jurisdiction in which there is an "appropriate" rule on "tolling." *Cf. Laffey* v. *Northwest Airlines, Inc.*, 321 F. Supp. 1041 (D. D.C. 1971). (Because the plaintiff joined a cause of action under Title VII with a cause of action under the Equal Pay Act of 1963, 29 U.S.C. §§206(d)(1), *et seq.*, the district court held that the general venue provision for federal courts applied.)

[19] Often, as is the case for a plaintiff like Mrs. Guy who lives in Memphis, it is convenient to bring an action in a number of circuits. It is only a short drive from Memphis to either the Eighth or the Fifth Circuits.

might be filed with it were tolled during the prosecution of grievance proceedings, and that where the timeliness of the charges depended upon such tolling EEOC had authority to process them and, if conciliation was not achieved, to authorize the charging parties to commence suit in district court pursuant to Title VII.[20] EEOC interpretations of Title VII are, of course, entitled to great deference. *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albermarle Paper Co.* v. *Moody*, 422 U.S. 405, 431 (1975). If the court does not resolve the conflicts between the circuits, the EEOC will be confronted with the bureaucratic tangle of processing charges of discrimination according to the state in which they arise.[21]

The other circuits have permitted tolling of the period for filing of charges with EEOC while grievance proceedings were being pursued, in order to protect against inadvertent loss of Title VII rights by employees following the common-sense approach of seeking first to resolve their disputes through the machinery established by the collective bargaining agreements. The decision of the court

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[20] While EEOC has not published formal regulations on the subject, it has announced its interpretation in EEOC Decision No. 70-675, March 31, 1970, CCH EEOC Dec. ¶ 6142 (1973), CCH Empl. Prac. Rep. ¶ 2325.123, and EEOC Decision No. 71-687, Dec. 16, 1970, CCH EEOC Dec. ¶ 6186 (1973), CCH Empl. Prac. Rep. ¶ 2325.302. Moreover, it has consistently both accepted and processed claims its jurisdiction over which has depended upon such tolling, and has issued right-to-sue letters upon failure of conciliation in such cases—as it did, for example, in the instant case. Finally, EEOC has reiterated its interpretation of the statute in its *amicus curiae* briefs filed in support of petitioner's appeal and petition for rehearing in the court below.

[21] Federal officials in the Atlanta regional office of EEOC which is responsible for processing charges of discrimination arising in states covered by both the Fifth and Sixth Circuits would be confronted with accepting and processing charges filed by Mississippians which on the same facts they would reject as untimely filed if filed by Tennesseeans.

below now casts serious doubt as to whether such employees are in fact protected. Unless that doubt is resolved, civil rights organizations, labor unions, and EEOC, will have the practically impossible task to try to keep employees informed of the danger that if they do not go through the motions of filing a charge with EEOC while pursuing their grievance remedies they may lose their right to sue under Title VII. The difficulty of the task is compounded by the fact that the message concerning the application of a federal statute will be different if the member of the union or civil rights organization works in, for example, Mississippi, Tennessee or Illinois.

Procedures of the type involved in this case are common in collective bargaining agreements involving millions of workers. Complaining employees are seldom represented by attorneys at the grievance stage, nor are many of them knowledgeable as to legal matters. See *Love* v. *Pullman Co.*, 404 U.S. 522, 527 (1972). As set forth above, there has been a steady stream of reported cases involving the principal question raised here—whether pursuit of the grievance procedures does or does not toll the statute of limitations for filing charges with the EEOC. In almost all of thes cases the courts have held that the limitations are tolled. Congress, in enacting the 1972 amendments to Title VII, was apparently concerned over the problem of potential forfeiture of Title VII claims by uninformed employees allowing the filing period to expire, and indicated its approval of the prevailing tendency of the courts to ameliorate some of the harsher applications of the limitation.[22]

The rule adopted by the Sixth Circuit in this case is contrary to public policy in that it requires the filing of an administrative charge before it is even clear if there

[22] 118 Cong. Rec. 7167 (March 8, 1972).

is an act which "aggrieves" the individual, and, if there is such an act, then before the final scope of that act has been defined. In a plant which is subject to union grievance proceedings, any decision by the employer is tentative until those proceedings have been completed. Until that time the aggrieved employee does not know what action, if any, the employer will actually take. The instant decision requires an employee to file a charge with EEOC before he or she knows for sure what discriminatory conduct the employer will undertake or whether he will decide to persist in such conduct at all. That rule makes no more sense than requiring an employee, aggrieved by the decision of his or her foreman, to file a charge with EEOC before appealing that decision to higher management.

The courts of appeals holding[23] that the amendment to Title VII passed in 1972 which extended the period for filing a charge with the EEOC from 90 to 180 days does not apply to pending charges and litigation is contrary to the principle "that a court is to apply the law in effect at the time it renders its decision." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974); *Thorpe* v. *Housing Authority of the City of Durham*, 393 U.S. 268 (1969); see also *supra* at 11.

The court of appeals ruling that the filing of a union grievance did not toll the running of the Title VII statute of limitation for filing an EEOC charge was based on a misinterpretation of *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974) and *Johnson* v. *Railway Express Agency, Inc.*, 421 U.S. 454 (1975). *Alexander* holds that grievance-arbitration procedures and Title VII actions are independent in the sense that utilization of the former is not an election of remedies barring employment of the latter. The Court, however, makes clear that "Title VII

[23] 17a and 525 F.2d at 128.

was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination." 415 U.S. at 48-49. And its conclusion "that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII" (415 U.S. at 59-60) argues against, rather than for, the decision of the court below that the employee's pursuit of the grievance-arbitration procedure should be allowed to result in the inadvertent loss of his rights under Title VII.[24] *Johnson* v. *Railway Express Agency,* is not applicable to the issue presented. In ruling that the processing of Title VII charges does not toll the statute of limitations for 42 U.S.C. § 1981, *Johnson* holds only that under § 1981 the state statute of limitations that is borrowed is applied in its entirety, including the presence or absence of the possibility of tolling as part of the state's statutory scheme. (421 U.S. at 463-64). It has no bearing upon the question of Congressional intention with regard to the propriety of tolling of limitation periods provided in a *federal statute.*

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

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[24] At the very least, *Alexander* v. *Gardner-Denver Co.,* does not foreclose the issue adversely to petitioner's claim. Compare *Hutchings* v. *United States Industries, Inc.,* 428 F.2d 303 (5th Cir. 1970), squarely holding *both* that institution of grievance-arbitration proceedings tolled the statute of limitations for filing charges with EEOC *and* that an adverse decision in arbitration did not preclude a cause of action under Title VII.

Alternatively, this petition for a writ of certiorari should be held pending the resolution of *McDonald* v. *Santa Fe Transportation Company, Brown* v. *General Services Administration,* and *Place* v. *Weinberger.*[25] If the Court determines that the processing of a union grievance tolls the running of the Title VII statute of limitations or that the Title VII statute of limitations period does not run until after the completion of the grievance process (*McDonald*), or that the 1972 amendments to Title VII should be applied to pending cases (*McDonald, Brown* or *Place*), the Court should grant the writ of certiorari, vacate the decision of the Sixth Circuit and remand with appropriate instructions.

Respectfully submitted,

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[25] As set forth above, *McDonald* v. *Santa Fe Transportation Co.*, raises all three of the issues in conflict presented by this petition; *Brown* and *Place* raise a closely analogous issue concerning the application of the 1972 amendments to Title VII to charges and litigation pending as of the effective date of the amendments, see *supra* at 7.

APPENDIX

Opinion of the District Court, June 12, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-74-165

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC. (HUNTER FAN DIVISION), et al,

Defendants.

MEMORANDUM OPINION AND ORDER

Defendant has renewed its motion to dismiss plaintiff's suit because of her failure to comply with 42 U.S.C. §2000e-5(d) requiring the filing of a charge with Equal Employment Opportunity Commission within 90 days after the alleged unlawful employment practice occurred.[1] The relevant times and acts that took place in this case all occurred prior to March 24, 1972. The amendment extending the time for filing 42 U.S.C. §2000e-5(e) was prospective in its application. From the pleadings and memorandum filed on plaintiff's behalf, it is clear that she was to report back

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[1] This provision in the 1964 Civil Rights Act dealing with employment discrimination was amended March 24, 1972, by the 1972 Civil Rights Act. (42 U.S.C. §2000e-5(e)).

to work on October 24, 1971, when her sick leave expired. On October 29, 1971, when she returned to work, she found that she had been terminated on October 25, 1971, as having voluntarily quit, a status she contested by filing a union grievance on October 27, 1971. She filed a charge against her employer with E.E.O.C. on February 10, 1972, asserting that the Company's action was unfair. (She did not describe it as discriminatory).

"It is true that the statute requires the person aggrieved to file a written charge within 90 days; it says so clearly and the courts so hold." *Fore* v. *Southern Bell Tel. Co.*, 293 F.Supp. 587, 588 (W.D. N.C. 1968). See also *McCarty* v. *Boeing Co.*, 321 F.Supp. 260 (W.D. Wash. 1970); *Younger* v. *Glamorgan Pipe Co.*, 310 F.Supp. 195 (W.D. Va. 1969); *Gordon* v. *Baker Prot. Services*, 358 F.Supp. 867 (N.D. Ill. 1973); and *Heard* v. *Mueller Co.*, 464 F.2d 190 (6th Cir. 1972).

"It may be conceded that a typical lay-off, without more, is not a continuing event, but is a completed act at the time it occurs, so that a charge alleging a discriminatory lay-off must ordinarily be filed within 90 days thereafter." *Sciaraffa* v. *Oxford Paper Co.*, 310 F.Supp. 891 (D. Me. 1970). From the complaint itself the alleged discriminatory discharge and refusal to reinstate took place in October, 1971, more than 90 days prior to the charge with the E.E.O.C. on February 10, 1972. Unless the act complained about were continuous in its nature, re-occurred after October, 1971, or unless the period were somehow tolled, plaintiff is barred because of her failure to comply with statutory jurisdictional requisites. *Choate* v. *Caterpillar Tractor*, 402 F.2d 357 (7th Cir. 1968); *Mickel* v. *S. C. State Emp. Service*, 377 F.2d 239 (4th Cir. 1967); *Sanchez* v. *Standard Brands*, 431 F.2d 455 (5th Cir. 1970).

> Senator Everett Dirksen on June 5, 1964, in explanation of changes made by the Senate in the House bill, with particular reference to Section 706(d):
>
> 'New Subsection (d) requires that a charge must be filed with the Commission within 90 days after the alleged unlawful employment practice occurred, except that if the person aggrieved follows State or local procedures in Subsection (b), he may file the charge within 210 days after the alleged practice occurred or within 30 days after receiving notice that the State or local proceedings have been terminated, whichever is earlier. The additional 120 days is to allow him to pursue his remedy by State or local proceedings." 11 Cong. Rec. 12297. *Banks* v. *Local Union #136*, 296 F.Supp. 1190 (1968)

Tennessee does not have a civil rights law or did not during 1971 and 1972.

Plaintiff contends, on the authority of *Culpepper* v. *Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970), that the 90 day period is tolled because she filed a grievance directed toward the defendant company within that period.[2] See *Hutchings* v. *U. S. Industries*, 428 F.2d 303, 309 (5th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779, 781 (9th Cir. 1972); *Moore* v. *Sunbeam Corp.*, 459 F.2d 811, 826 (7th Cir. 1972). These cases, however, are based on the rationale that plaintiff should be encouraged first to try the grievance procedures before resorting to the E.E.O.C. and that the acts are interrelated in respect to disputes over discrimination. *Dewey* v. *Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by a divided Supreme

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[2] She also complains that the defendant union failed to represent her fairly and diligently.

Court, 402 U.S. 689 (1971). *Dewey* and its progency held that pursuing a contractual grievance remedy to its conclusion might estop later pursuit by a claimant of E.E.O.C. procedures and suit; that the remedies were related and interconnected. *Culpepper, supra,* held, however, that utilization of grievance procedures did not estop, preclude, or constitute an election of remedies insofar as a grievant was concerned who might later claim violation of the 1964 Civil Rights Act equal employment provisions.

In 1974, however, the Supreme Court unanimously in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 42 L.W. 4214 (2-19-74) disavowed the *Dewey* v. *Reynolds Metals, supra,* rationale. At page 10 of the slip opinion, the Court acknowledges that "Title VII does not speak expressly to the relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements. It does, however, vest federal courts with plenary powers to enforce the statutory requirements; *and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit.*" (Emphasis ours.) The Court goes on to hold that grievance-arbitration procedures neither foreclose nor preclude an individual's E.E.O.C. rights and requirements, nor divest the court of jurisdiction to decide equal employment discrimination questions that may arise under the Act. In other words, "Title VII manifests a Congressional intent to allow an individual to pursue independently his rights under Title VII" and other statutes or private contract remedies, even though these rights have a "distinctly separate nature." (pp. 11, 13 slip opinion, *Alexander* v. *Gardner-Denver, supra*). In another place, pp. 14, 15, Justice Powell, speaking for a unanimous court says "Title VII strictures are absolute" and "are not susceptible to prospective waiver."

Since rights under Title VII and under the contract between the parties "have legally independent origins and are equally available," it appears that both should proceed independently and in accordance with their own statutory or contractual limitations and requirements. The rationale of *Alexander* v. *Gardner-Denver Co., supra,* persuades this Court that the 90 day Title VII requirement for filing a claim with the E.E.O.C. after the occurrence of the alleged discriminatory event is not effected or abated or tolled by an independent grievance-arbitration proceeding under a contract. The E.E.O.C., after all, is required by the statute in question to attempt reconciliation and negotiation of the differences before further action is taken. Thus, grievance and conciliation procedures independently would work for a settlement and disposition of the disputes between employer and employee. Whether or not an employee files a grievance, or files an E.E.O.C. charge, he or she still has a separate right to claim 42 U.S.C. §1981 (1866 Civil Rights Act) violations. *Long* v. *Ford Motor Co.,* —— F.2d —— (6th Cir. 4-30-74). That employee, however, must abide by applicable statute of limitations requirements as to a Section 1981 claim, just as he or she must also comply with contractual or 42 U.S.C. §2000e-5(e) prerequisites.

Since plaintiff did not file her claim with the E.E.O.C. within 90 days after her alleged discriminatory discharge, defendant employer's motion to dismiss the 1964 Civil Rights, Title VII, claim is granted.

This 12th day of June, 1974.

HARRY (Illegible)
United States District Court Judge

CERTIFIED TRUE COPY
J. FRANKLIN REID, Clerk
By (Illegible)
Deputy Clerk

Opinion of the District Court, June 19, 1974

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TENNESSEE

WESTERN DIVISION

No. C-74-165

DORTHA ALLEN GUY,

Plaintiff,

vs.

ROBBINS & MYERS, INC.
(Hunter Fan Division), et al.,

Defendants.

ORDER ON RECONSIDERATION

The Court on May 30, 1974, entered an order in this cause dismissing plaintiff's alleged cause of action under 42 U.S.C. §1981 and overruling defendant's motion on the question as to whether the filing of her complaint came within the 90 day period after issuance of the right-to-sue letter. (In effect, because it involved a possible factual dispute, it was held to be appropriate to reserve a ruling for a hearing on the merits.) Without then expressly so ruling, the Court indicated that the recent Supreme Court decision of *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 94 S.Ct. 1011, 42 L.W. 4214, 1974) "might indicate that the Union contractual grievance and the E.E.O.C. claim, being independent of each other, . . . would not

amount to a tolling of nor effect any extension of a [90 day] limitation period. See *Johnson* v. *R.E.A.*, 489 F.2d 525, 529 (6th Cir. 1973) *reh. denied*, (1974) petition for certiorari applied for."

Plaintiff moved to amend her complaint, and defendant Robbins & Myers moved the Court to reconsider and formally rule on its motion to dismiss alleging plaintiff's failure to file her charge with E.E.O.C. within 90 days of the happening of the alleged discriminatory act on defendant Robbins & Myers' part.

The Court then entered an order ruling on defendant Robbins & Myers' motion to dismiss and sustaining it on the failure of plaintiff to file a claim with E.E.O.C. within the statutory period. (See the memorandum opinion and order dated June 12, 1974). Plaintiff has moved that the Court reconsider this opinion, especially in light of *Schiff* v. *Mead Corp.*, 3 EPD #8043 (6th Cir. 1970), unreported. The Court was aware of this decision, however, when it rendered its opinion adverse to plaintiff's contentions. The primary factor involved there was a change of position on the part of E.E.O.C. which influenced the Court[1] to decide that the filing of a contractual grievance might toll the 90 day statutory period prescribed in 42 U.S.C. §2000e-5(d).[2] The *Schiff* v. *Mead Corp.* case, however, was decided at a time that *Dewey* v. *Reynolds Metals*, 429 F.2d 324 (6th Cir. 1970) affirmed by an equally divided Supreme Court, was considered the law in this Circuit. The *Dewey* rationale was overruled in *Alexander* v. *Garden-Denver Co., supra.* It was there emphasized that the E.E.O.C. claims and procedures were separate and independent and that action

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[1] (U.S.D.C. N.D., Ohio)

[2] Now amended by the 1972 Equal Employment Opportunity Act.

or conduct taken in behalf of one such claim had no preclusive effect on the other. *Johnson* v. *R.E.A., supra,* had held that filing of an E.E.O.C. charge did not toll the statute of limitations on a 42 U.S.C. §1981 civil rights action. *Long* v. *Ford Motor Co.*, #73-1993, —— F.2d —— (6th Cir. 4-30-74) held that 42 U.S.C. §2000e (Title VII) actions and 42 U.S.C. §1981 are independent of one another, and, as we construe it, that the District Court[3] was correct in holding that the Title VII statutory time requirements for filing a charge were not tolled by the filing of a suit under the 1866 Civil Rights Act. On the other hand, the District Court's findings for the claimant under the latter statute were to be reconsidered on remand in light of *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973).

On the face of the Title VII statute, the only means of tolling the 90 day period for filing an E.E.O.C. charge after the alleged discriminatory event was (and is) a filing of a charge or claim with a state or local agency having authority to deal with equal employment opportunities and discrimination. This plaintiff Guy could not do, because Tennessee nor Shelby County has any such agency or law authorizing such a body.

After the discharge in question, Guy had a legal right to file a grievance against her employer under the Union contract, provided she adhered to its terms. Whether or not she filed her grievance, plaintiff also had a right within 90 days to file a charge of racial discrimination. Within a year, whether or not she pursued contractual or E.E.O.C. procedures, she had a right to file suit for alleged discrimination under 42 U.S.C. §1981. Plaintiff failed to follow through with either of the latter two statutory rights in accordance with applicable time requirements. Defen-

[3] (U.S.D.C. E.D., Mich.)

dant's motion to dismiss is proper under these circumstances.

It should be noted that plaintiff did in fact pursue her grievance through three levels unsuccessfully.[4] Furthermore, E.E.O.C. investigated her claim and determined on November 20, 1973, that "the Commission finds no reason to believe that race was a factor in the decision to discharge. . ." Plaintiff waited until the last day of the 90 days given her, or until beyond the ninetieth day in which to seek the Court's assistance in filing her Title VII suit after having received an adverse determination to her claims since October of 1971. This lack of diligence, in and of itself, might not constitute a bar, *Harris* v. *Walgreen's Dist. Center,* 456 F.2d 588 (6th Cir. 1972), but is indicative of plaintiff's dilatory role in these proceedings throughout. See *Fekete* v. *U.S. Steel,* 424 F.2d 331 (3rd Cir. 1970) as to the effect of a negative E.E.O.C. determination involving "possibilities of sophisticated discrimination . . . because of European ancestral origin" after an arbitrator's reinstatement of claimant with back pay—an entirely different situation from that at bar. Compare *Beverly* v. *Lone Star Lead,* 437 F.2d 1136 (5th Cir. 1971) dealing with this question where plaintiff filed his claim with E.E.O.C. a week after the alleged discriminatory event, and within approximately 20 days after an adverse E.E.O.C. determination, filed his suit in federal court.

Mrs. Guy was not "penalized" for her seeking "to adjust her dispute with her employer through the private machinery of the grievance procedure" as described in *Malone* v. *N. American Rockwell,* 457 F.2d 779 (9th Cir. 1972). That case did not decide whether there had been a

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[4] See the findings and conclusions of E.E.O.C. filed as a part of the record in this cause.

continuing act of discrimination for failure to promote, or whether the settlement of a grievance was in itself a discriminatory act with respect to whether claimant had delayed too long in filing a claim with E.E.O.C. after intervening investigation by a state employment opportunities commission. This Court has granted the motion to dismiss upon reconsideration, because plaintiff, a Union steward, did not comply with Title VII statutory time requirements of filing her E.E.O.C. charge after her termination.

Plaintiff's claims against the employer, Robbins & Myers, must stand dismissed.

CERTIFIED TRUE COPY
J. FRANKLIN REID, *Clerk*

BY M. CLEAUES
Deputy Clerk

United States District Court Judge

Date:

Opinion of the Court of Appeals, October 24, 1975

Nos. 72-2144 & -2145

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE.

DORTHA ALLEN GUY

and

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFI-CIO LOCAL 790,

Plaintiff-Appellants,

v.

ROBBINS & MYERS, INC.
(HUNTER FAN DIVISION),

Defendant-Appellee.

Decided and Filed October 24, 1975.

Before:

WEICK, EDWARDS and PECK,

Circuit Judge.

WEICK, Circuit Judge, delivered the opinion of the Court, in which PECK, Circuit Judge, joined, EDWARDS, Circuit Judge, (pp. 8-10) filed a separate dissenting opinion.

WEICK, Circuit Judge. Appellant Guy has appealed from an order of the District Court dismissing her complaint for

wrongful discharge brought under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. She claimed that her employer discharged her on account of her race (Negro).

The District Court granted the defendant's motion to dismiss her Title VII claim on the ground that plaintiff had not met the jurisdictional prerequisites of § 2000e-5(d) of the Act which were in force at the time.[1] The Act required her to file a charge with the Equal Employment Opportunity Commission (EEOC) within 90 days from the date of her discharge. She did not file the charge until after the lapse of 108 days.

The District Court dismissed her claim for violation of § 1981 of 42 U.S.C. on the ground that it was barred by the one year Tennessee statute of limitations. Tenn. Code 28-304.

It was Guy's contention that the 90 day requirement of the Act was tolled during the pendency of a grievance which she had filed with her employer under the provisions of a collective bargaining agreement entered into between her employer and the defendant labor Union.

The sole appellate issue is whether the filing of the grievance tolled the jurisdictional requirements of the Act.

Guy's claim under 42 U.S.C. § 1981 was controlled by our decision in *Johnson* v. *Railway Express Agency, Inc.*, 489

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[1] "(d) A charge under subsection (a) of this section shall be filed within ninety days after the alleged unlawful employment practices occurred. Except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b) of this section, such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

F.2d 525 (6th Cir. 1973), which was affirmed by the Supreme Court on May 19, 1975, 95 S.Ct. 1716 (1975). Guy has not appealed from this ruling and it has become final.

The Union originally was a party defendant but was dismissed by agreement with the plaintiff and has been realigned as a party plaintiff.

The facts pertaining to the Title VII issue were not in dispute. Guy was discharged on October 25, 1971 for failing to report for work following an authorized sick leave. A co-worker filed a grievance for her with the employer on October 27, 1971 which stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time." She did not explicitly claim racial discrimination. Guy processed her grievance to the third step under the collective bargaining agreement. The company rejected the grievance on November 18, 1971. Guy decided not to proceed further to arbitration. Instead she filed a charge with EEOC on February 10, 1972 which was 108 days from the date of her discharge.

The EEOC, although finding no evidence of racial discrimination, granted a right to sue letter which resulted in the filing of the present suit.

The District Judge was of the opinion that this case was controlled by the recent decision of the Supreme Court in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974).

While the specific holding in *Gardner-Denver* was that the adverse decision of an arbitrator did not foreclose resort by the grievant to her federal remedy, the reasoning of the court, in our judgment, supports the proposition that the filing of a grievance under a collective bargaining agreement does not toll the limitation period of an applicable federal or state statute.

The court pointed out that "in instituting an action under Title VII the employee was not seeking to review an arbi-

trator's decision but was asserting a right independent of the arbitration process."

The court referred to the legislative history which indicated Congressional intent that an employee could pursue any remedy which he may have under state or federal law. Thus, the employee could file proceedings under the National Labor Relations Act or with other federal, state or local agencies or pursue contractual remedies. In *Johnson* v. *Railway Express Agency, supra,* the court held that the various remedies are "separate, distinct and independent."

It would be utterly inconsistent with the thesis of *Gardner-Denver* and *Railway Express Agency* to hold that the pursuit of any of these remedies operates to toll other remedies which the employee has a right to resort to concurrently. See the statements of Senators Humphrey and Dirksen reported in 11 Cong. Rec. 12297 and quoted in *Banks* v. *Local Union, 136 Int'l Bhd. Elec. Eng'rs,* 296 F.Supp. 1188 (N.D. Ala. 1968).

In Tennessee, Civil Rights remedies are not provided by state or local law.

Subsection 5(d) of the Act contains an exception when the grievant has availed himself of remedies provided by state or local Civil Rights agencies and in such a case extends the time for filing a charge with EEOC from 90 days to 210 days after the unlawful employment practice or within 30 days after receipt of notice of termination of state or local proceedings, whichever is earlier.

Guy would have us add another exception to the Act to toll the limitations' period of 90 days when the grievant resorts to a contractual remedy under a collective bargaining agreement.

We are not persuaded that we should add additional exceptions not authorized by Congress.

But most important is the language of Mr. Justice Powell who wrote the unanimous opinion of the court in *Gardner-Denver* at 47:

> . . . It does, however, vest federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit. In the present case, these prerequisites were met when petitioner (1) filed timely a charge of employment discrimination with the Commission, and (2) received and acted upon the Commission's statutory notice of the right to sue. 42 U.S.C. §§ 2000e-5 (b), (e), and (f).

This is a clear pronouncement that the 90 day limitation period in the Act for filing a charge with EEOC is a jurisdictional prerequisite "that an individual must satisfy before he is entitled to institute a lawsuit." Here Guy admittedly did not meet the jurisdictional prerequisite.

The limitation in Title VII is more than a mere statute of limitations. The Act creates a right and liability which did not exist at common law and prescribes the remedy. The remedy is an integral part of the right and its requirements must be strictly followed. If they are not, the right ends.

As early as 1886 the Supreme Court recognized the distinction between a statute of limitation and a limitation contained in a statute creating liability and imposing a remedy. In *The Harrisburg,* 119 U.S. 199, 214, the court stated:

> . . . [W]e are entirely satisfied that this suit was begun too late. The statutes create a new legal liability, with the right to a suit for its enforcement, provided

the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . .

In *Matheny* v. *Porter, Price Adm'r,* 158 F.2d 478, 479 (10th Cir. 1946), the court said:

> . . . Ordinarily, a statute of limitation does not confer any right of action, but merely restricts the time within which the right finding its source elsewhere may be asserted. It is not a matter of substantive right. It neither creates the right nor extinguishes it. It affects only the remedy for the enforcement of the right. And unless it affirmatively appears from the face of the complaint that the cause of action is barred by the applicable statute, limitation must be presented by special plea in defense. . . .
>
> But here, section 205(e) creates a new liability, one unknown to the common law and not finding its source elsewhere. It creates the right of action and fixes the time within which a suit for the enforcement of the right must be commenced. It is a statute of creation, and when the period fixed by its terms has run, the substantive right and the corresponding liability end. Not only is the remedy no longer available, but the right of action itself is extinguished. The commencement of the action within the time is an indispensable condition of the liability. Cf. The Harrisburg, 119 U.S. 199, 7 S.Ct. 140, 30 L.Ed. 358; Midstate Horticultural Co., Inc. vs. Pennsylvania R. Co., 320 U.S. 356, 64 S.Ct. 128, 88 L.Ed. 96.

In *Callahan* v. *Chesapeake & O. Ry. Co.*, 40 F.Supp. 353, 354 (E.D. Ky. 1941), District Judge Mac Swinford stated:

> The rule is stated in the syllabus from Morrison v. Baltimore & Ohio Railroad Company, 40 App. D.C. 391, Ann. Cas. 1914C, page 1026, as follows: "Under the Federal Employers' Liability Act of June 11, 1906, (Fed. St. Ann. 1909 Supp. p. 585) the time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statute, and the limitations of the remedy are therefore to be treated as limitations of the right."

Johnson v. *Railway Express Agency, supra,* held that the timely filing of a charge with EEOC under Title VII of the Act did not toll Tennessee's applicable one year statute of limitations. It would therefore appear to us to be utterly incongruous for us to hold that a federal statute which contains jurisdictional prerequisites for the exercise of its remedies is tolled by the mere filing of a grievance under a collective bargaining agreement.

Under Guy's contention the exercise of rights under Title VII could be delayed indefinitely for many years while an individual is pursuing other remedies. This contention conflicts with Congressional intent made manifest by the short periods of time provided in the Act as prerequisites for the exercise of the rights.

Guy relies on the following decisions from other Circuits: *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888 (5th Cir. 1970); *Hutchings* v. *U.S. Industries, Inc.*, 428 F.2d 303 (5th

Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Sanchez* v. *T.W.A.*, 499 F.2d 1107 (10th Cir. 1974).

It is noteworthy that all of these cases, except *Sanchez*, were decided prior to *Gardner-Denver* and hence are inapposite. *Sanchez* relies on these prior decisions. *Sanchez* conflicts with *Johnson* v. *Railway Express Agency, supra.*

In the brief of EEOC as amicus curiae a new issue is injected into the case which was not raised by plaintiff in the District Court, namely, that under the 1972 amendments to Title VII it had authority to assume jurisdiction retroactively to charges pending before the Commission. It relies on *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

Since this issue was not raised in the District Court by any party to the case, we are not required to consider it. *United States* v. *Summit Fid. & Sur. Co.*, 408 F. 2d 46 (6th Cir. 1969); *Wiper* v. *Great Lakes Engineering Works*, 340 F. 2d 727 (6th Cir.), *cert. denied*, 382 U.S. 812 (1965).

We do note, however, that in *Love, supra*, the charge had been timely filed with the Commission so that the jurisdictional prerequisite had been met.

Plaintiff Guy's claim was barred on January 24, 1972. She did not file her charge with EEOC until February 10, 1972. The amendments to Title VII, increasing the time within which to file her charge to 180 days, did not become effective until March 24, 1972. 42 U.S.C. § 2000e-5(e). The subsequent increase of time to file the charge enacted by Congress could not revive plaintiff's claim which had been previously barred and extinguished.

The judgment of the District Court is affirmed.

EDWARDS, Circuit Judge, dissenting. Appellant Guy was discharged for failure to report back to work on her

production job with appellee Robins and Meyers at the end of sick leave which had been granted to her. She claims that she notified appellee that she was not able to return on the day set, but when she did return four days later, she was informed she had been discharged.

Promptly on October 27, 1971, the union filed a grievance on her behalf, alleging that the discharge was illegal under the union-management contract. This grievance was denied at the third step on November 18, 1971. Thereafter plaintiff filed a charge, alleging that her discharge was racially motivated, before the Equal Employment Opportunity Commission. This charge was filed February 10, 1972, 108 days after her discharge. At the time the EEOC limitation provided for a 90-day period within which to file the charge. On March 24, 1972, however, Title VII was amended to increase the filing time to 180 days. See 42 U.S.C. § 2000e-5(d). EEOC, in an amicus brief filed in this appeal, asserts that the 1972 amendment should be read retrospectively as applicable to appellant's complaint, since it was pending in EEOC's possession at the time when the amendment became effective 151 days after plaintiff's discharge.

The EEOC position is that the amendment did not create a new cause of action. It merely increased the period from 90 to 180 days before the limitation became effective.

In *Davis* v. *Valley Distributing Co.*, —— F.2d —— (9th Cir. 1975) (No. 73-2725, decided July 30, 1975), the court, per Browning, J., held that a similar 180-day extension amendment (applicable to filing before the EEOC) should be given retroactive effect. The court said:

> The 1972 Act became effective March 24, 1972. The prior 90-day limitation had run on appellant's complaint some 54 days earlier. It is the general rule that

subsequent extensions of a statutory limitation period will not revive a claim previously barred. *James* v. *Continental Insurance Co.*, 424 F.2d 1064, 1065-66 (3d Cir. 1970). But the question is one of legislative intent; and though not free from doubt, we think it the more likely conclusion that Congress intended the extended limitations period to apply to all unlawful practices that occurred 180 days before the enactment of the 1972 Act, including those otherwise barred by the prior 90-day limitations period.

Section 14 of the 1972 Act provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter.

Initially, both the House and Senate bills provided that the amendments to section 706 would *not* apply to charges filed prior to the effective date of the amendments. H.R. 1746, 92d Cong., 2d Sess. § 10 (1972); S. 2515, 92d Cong., 2d Sess. § 13 (1972). Section 14 was adopted primarily to make the new authority given EEOC to bring suit against alleged violators applicable to pending claims. *EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1355 (6th Cir. 1975); *Koger* v. *Ball*, 497 F.2d 702, 708 (4th Cir. 1974). But Congress did not limit section 14 of the 1972 Act to the new remedy, although it would have been simple to do so. The language of section 14 is sweeping. It includes all amendments to section 706. Congress was, of course, aware of the other amendments to section 706 contained in the same bill. The provision extending the limitation periods

was called to Congress' attention by committee reports and in floor debate. In both the House and Senate, prior court decisions maximizing coverage within the given time limits were noted with approval, and the remedial purpose of extending the 90-day period to 180 days was emphasized.

The words of section 14 affirmatively suggest an intention to encompass discriminatory conduct that occurred before the Act was passed. "[C]harges pending with the Commission on the date of enactment of this Act" could only involve conduct occurring prior to that date. It might be contended that a charge filed with EEOC after the pre-amendment 90-day limitation had expired, as in this case, was not "pending" on the effective date of the Act. It is unnecessary to argue the point. Section 14 also makes the amendments applicable to "all charges filed thereafter." Since appellant's claim was not formally "filed" until EEOC assumed jurisdiction after the claim was returned by the Arizona Commission, it fell within the literal words of the statute.

There is no substantial reason for giving less than their full meaning to the words of section 14. Even as extended, the time limits under the statute are exceedingly short, particularly since, as Congress noted, most complainants are laymen representing themselves. The Equal Employment Opportunity Act is a remedial statute to be liberally construed in favor of victims of discrimination. *EEOC* v. *Wah Chang Albany Corp.*, 499 F.2d 187, 189 (9th Cir. 1974). Accordingly, "courts confronted with procedural ambiguities in the statutory framework have, with virtual unanimity, resolved them in favor of the com-

> plaining party." *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455, 461 (5th Cir. 1970).
> *Davis* v. *Valley Distributing Co., supra,* at —. (Footnotes omitted.)

This issue, as outlined above, was not presented to the District Court in our instant case, and in fairness to the District Judge, it should be.

I would remand this case for consideration of the effect of the 1972 EEOC amendments.

Order

Nos. 74-2144 & -2145

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Dortha Allen Guy,
and
International Union of Electrical, Radio and Machine Workers, AFL-CIO Local 790,

Plaintiffs-Appellants,

vs.

Robbins & Myers, Inc. (Hunter Fan Division),

Defendant-Appellee.

Before

Weick, Edwards and Peck,

Circuit Judges.

This cause came on to be heard upon the petition for rehearing with the suggestion that it be reheard en banc. No active Judge having requested that the petition be reheard en banc, the petition for rehearing was considered by the panel and was found to be not well taken.

It is therefore Ordered that the petition for rehearing be and it is hereby denied. Judge Edwards dissents.

Entered By Order of the Court

/s/ John P. Hehman
Clerk

APR 23 PAGE 3

Supreme Court, U. S.
FILED
APR 22 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

—v.—

ROBBINS & MYERS, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI

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Supreme Court of the United States

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—v.—

ROBBINS & MYERS, INC.,

Respondent.

REPLY BRIEF IN SUPPORT OF CERTIORARI

This petition for certiorari presents important questions for review. In refusing to apply Section 706(e) of Title VII as amended in 1972[1] to charges of discrimination pending with the Equal Employment Opportunity Commission (EEOC) as of that amendment's effective date, the Sixth Circuit decision is in conflict with a decision of the Ninth Circuit.[2] *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975) *cert. pending sub nom. Valley Distributing Co.* v. *Davis,* No. 75-836. The United States has filed a brief *amicus curiae* in opposition to the issuance of a writ of certiorari in No. 75-836, and, accordingly in favor, in effect, of the issuance of a writ of certiorari in *Guy.*

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[1] 42 U.S.C. §2000e-5(e) as amended by the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, set forth in the Petition for a Writ of Certiorari, p. 3.

[2] See Petition for a Writ of Certiorari, pp. 10-12.

In light of the substantial administrative problems which the conflict between the Courts of Appeals will cause the Equal Employment Opportunity Commission[3] and in light of the stated concern of the United States in No. 75-836, the petitioners respectfully suggest that the Court request the United States to file a brief setting forth the interests of the federal government.

Respondent suggests that the question of the applicability of the 1972 amendments to Petitioner's Title VII charge is not properly before this Court[4] because the Petitioner failed to raise this legal argument in the district court. The Respondent is in error. The pertinent facts concerning the question were presented to the district court and are uncontested. The petitioner presented an alternative legal argument in the Sixth Circuit in support of her position that the district court had jurisdiction to hear her claim of racial discrimination in employment. The Sixth Circuit heard the argument and ruled against the Petitioner, (18a; see dissenting opinion of Judge Edwards, 18a-23a). It has been the consistent rule of this Court to permit amendment of jurisdictional pleadings where the jurisdictional facts appear on the face of the record. *Willingham* v. *Morgan*, 395 U.S. 402 (1969); *Realty Holding Co.* v. *Donaldson*, 268 U.S. 398 (1925); *Norton* v. *Larney*, 266 U.S. 511 (1925); *Howard* v. *De Cordova*, 177 U.S. 609 (1900). *A fortiori* where the facts are presented and are uncontested in the district court and where the jurisdictional allegations are properly made it is appropriate to consider a legal argument based on these

---

[3] See Petition for a Writ of Certiorari, pp. 13-15.

[4] Brief for Respondent In Opposition to Certiorari, p. 6.

facts and pleadings which was first made in the Court of Appeals.

Respectfully submitted,

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In the

Supreme Court of the United States

October Term, 1975

No. 75-1276

Dortha Allen Guy,

Petitioner,

—v.—

Robbins & Myers, Inc.

BRIEF FOR PETITIONER

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 525 F.2d 124 (Pet. 11a-22a).[1] The Court of Appeals denied rehearing (Pet. 23a). The orders and opinions of the district court dismissing the petitioner's Title VII claims, which are not officially reported, appear at 8 EPD ¶¶ 9573 and 9574, 8 FEP Cases 311 and 313[2] (Pet. 1a-5a; 6a-10a).

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[1] References in this form are to the appendix to the petition for a writ of certiorari filed in No. 75-1276.

[2] The district court's opinion dismissing the petitioner's claim filed pursuant to 42 U.S.C. §1981 appears at 8 EPD ¶9572, 8 FEP Cases 309 (IUE Pet. 14a-19a). References in this form are to the appendix to the petition for a writ of certiorari filed in No. 75-1264, which has been consolidated for argument with this case.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. § 1254 (1). The opinion of the United States Court of Appeals for the Sixth Circuit was entered on October 24, 1975; that Court denied petitioner's petition for rehearing on December 9, 1975. The Petition for a Writ of Certiorari was filed on March 8, 1976 and was granted on April 26, 1976.

Statutory Provisions Involved

Section 706(d) of the Civil Rights Act of 1964, 78 Stat. 241, 260, 42 U.S.C. § 2000e-5(d) (1970), before its amendment in 1972, read as follows:

> (d) A charge under subsection (a) shall be filed within ninety days after the alleged unlawful employment practice occurred, except that in the case of an unlawful employment practice with respect to which the person aggrieved has followed the procedure set out in subsection (b), such charge shall be filed by the person aggrieved within two hundred and ten days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency.

The same provision, as amended by Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, and renumbered Section 706(e), 42 U.S.C. § 2000e-5(e) (Supp. II 1972), reads as follows:

> "(e) A charge under this section shall be filed within one hundred and eighty days after the alleged unlaw-

> ful employment practice occurred and notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) shall be served upon the person against whom such charge is made within ten days thereafter, except that in a case of an unlawful employment practice with respect to which the person aggrieved has initially instituted proceedings with in State or local agency with authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, such charge shall be filed by or on behalf of the person aggrieved within three hundred days after the alleged unlawful employment practice occurred, or within thirty days after receiving notice that the State or local agency has terminated the proceedings under the State or local law, whichever is earlier, and a copy of such charge shall be filed by the Commission with the State or local agency."

Section 14 of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 113, reads as follows:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter.

Questions Presented

1. Whether the limitations period for filing a charge with the EEOC begins to run from the final decision of a company after the completion of grievance-arbitration proceedings, or from the Company's initial decision prior to the commencement of those proceedings?

2. Whether the limitations period for filing a charge with the EEOC is tolled during the pendency of grievance or arbitration proceedings?

3. Whether the 1972 amendments to Title VII, enlarging the time for filing a charge with the EEOC to 180 days, should be applied to a charge pending before the EEOC on the effective date of the amendment?

Statement of the Case

This case presents questions concerning the application of the Title VII[3] administrative process. At issue is the continued viability of Title VII as a means for minority and female workers to have their allegations of discrimination heard in federal court, on the one hand, and on the other hand, to maintain the grievance-arbitration clauses of collective bargaining agreements as a viable means of informal conciliation and private settlement of employment disputes.

The petitioner, Dortha Allen Guy, brought this action under Title VII and the Civil Rights Act of 1866, 42 U.S.C. §1981. Guy alleged that her former employer, Robbins & Myers, Inc. (the Company), had discriminated against her because she was black, both in discharging her and in failing to reinstate her,[4] and that her labor union, Local 790 of the International Union of Electrical, Machine and Radio Workers (the Union), had not fairly represented her in grievance proceedings.

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[3] Title VII of the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§2000e *et seq.*

[4] Guy alleged that she had followed the Company rules for reporting absence due to sickness and that at least one white employee had followed the same procedures as she had but had been reinstated (6a-7a).

Guy was initially employed by the Company in 1968. From October 19th through the 24th, 1971, Guy was absent on sick leave. On the 25th Guy alleged that she called the Company and left a message that she would not be at work since it was necessary for her to visit her doctor. The Company discharged Guy on October 25 for having "voluntarily quit". Two days later, on October 27, 1971, Guy, who was a Union steward, caused a grievance to be filed[5] pursuant to the provisions of the collective bargaining between the Company and the Union. The collective bargaining agreement contained a specific provision barring racial discrimination in employment.[6] The grievance stated: "Protest unfair action of company for discharge. Ask that she be reinstated with compensation for lost time" (18a). Guy expeditiously processed the grievance through the various steps provided by the grievance-arbitration clause.[7] The Company's Personnel Director

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[5] Guy visited her physician, was treated by him, and told not to report to work; accordingly, Guy did not report for work until October 29 (6a-7a). A co-worker filed the grievance on behalf of Guy.

[6] The agreement reads as follows:

Article XXXI—No Discrimination

Section 1. The provisions of this contract shall be applied to all employees without discrimination by either the Company or the Union on the account of sex, race, color, creed, or national origin. The parties further agree to comply with the provisions of the Age Discrimination in Employment Act of 1967 (35a).

[7] The four steps provided for in the Collective Bargaining Agreement (Article XVIII—Grievance Procedure) are as follows: Step 1 provides for proceedings between the employee and his foreman, Step 2 between the Chief Steward and the General Foreman, Step 3 between the Union Officers and representatives of Management, and Step 4 for arbitration (35a-6a).

This procedure is similar to grievance-arbitration clauses throughout industry. See *Basic Patterns in Union Contracts*, Eighth Edition—1975 (Washington, D.C.) ("Basic Patterns") at 32-5.

denied Guy's grievance on November 18, 1971 (18a-9a). Guy did not elect to pursue the grievance beyond the third step and the Union did not take the petitioner's claim to arbitration.

On February 10, 1972, 84 days after the Company's Personnel Director denied the grievance but 108 days after her discharge, Guy filed a charge with the EEOC, alleging racial discrimination in her discharge. On November 20, 1973, after it had accepted and processed the charge, the EEOC found that there was no reasonable cause to believe that the discharge was racially motivated.[8] After receiving her formal notice of right to sue, Guy instituted an action in the United States District Court on March 19, 1974.

The district court by order entered on June 12, 1974, granted the Company's motion to dismiss the Title VII cause of action because the petitioner had not filed her charge of discrimination with the EEOC within the 90-day period prescribed prior to 1972 by Section 706(d) of the Civil Rights Act of 1964,[9] (1a-5a). The petitioner's motion to reconsider was denied on June 19, 1974 (Pet. 6a-10a). On August 26, 1974, the District Court, on motions filed by both Guy and the Union, dismissed the complaint against the Union and re-aligned the Union as a party plaintiff (39a-40a). The Union and Guy appealed to the United States Court of Appeals for the Sixth Circuit.

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[8] A finding of no reasonable cause does not bar the aggrieved person from filing a Title VII action. *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 798 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 48 n.8 (1974).

[9] By an order entered on May 30, 1974, the district court dismissed Guy's cause of action under §1981 because of a failure to meet the applicable Tennessee statute of limitations (IUE, Pet. 14a-19a). No appeal was taken from this decision.

The Court of Appeals affirmed the dismissal of Guy's Title VII cause of action on October 24, 1975, by a divided vote (Pet. 11a-22a), and denied the petition for rehearing on December 9, 1975 (Pet. 23a). The Court of Appeals assumed that the limitations period for filing a charge with the EEOC commenced on October 25, 1971, rather than from November 18, 1971, when the Personnel Manager denied Guy's appeal through the grievance procedure; the court expressly held that it was barred from tolling the running of the limitations period by this Court's decisions in *Johnson* v. *Railway Express Agency,* 421 U.S. 454 (1975), *Alexander* v. *Gardner-Denver Company,* 415 U.S. 36 (1974), and *The Harrisburg,* 119 U.S. 199 (1886). Finally, the court held that the 1972 amendments to Title VII, insofar as they extended the period for filing an EEOC charge from 90 to 180 days, should not be applied to charges which were filed before the amendment but which were still pending on the effective date of those amendments.

ARGUMENT

I.

Petitioner's EEOC Charge Was Filed Within 90 Days As Required by Section 706 of Title VII Prior to the 1972 Amendment.

A. The Limitations Period Began to Run on November 18 When the Company Rejected Petitioner's Grievance, Rather Than When the Company Initially Decided to Discharge Her.

In ruling that Guy's EEOC charge was filed untimely, the Sixth Circuit held that it was barred from applying the doctrine of tolling in light of the decision in *The Harrisburg, supra,* and this Court's discussion in *Alex-*

ander v. *Gardner-Denver Co., supra,* and *Johnson* v. *REA, supra,* of the relationship of Title VII to other procedural mechanisms for remedying claims of employment discrimination. (Pet. 14a-18a) While this holding is incorrect, see Section B, *infra,* the question of tolling need not be reached. Petitioner maintains that the Company's decision to discharge her did not become final until the completion of grievance proceedings on November 18, 1972, and that the limitations period only commenced to run on that date.

However, Guy had a right to appeal this initial notice of discharge within the personnel administration of the Company by means of the grievance procedure.[10] Guy invoked the grievance procedure on October 27, in a good-faith effort to constructively resolve her complaint. During the three-step grievance procedure the decision rests exclusively with management.[11] (35a-6a) The grievance procedure provides for a quick, informal evaluation by Company managers of the initial employment decision; here the three-step process was completed in twenty-two days, from October 27 to November 18, 1971.[12] The discharge of Guy was not final until November 18, when the grievance procedure was exhausted; the limitations period should not have begun to run until that date.

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[10] The three steps of the grievance procedure provide for application by the aggrieved worker to officials of progressively greater responsibility in the Company's managerial hierarchy: the first-step application is made to the foreman, the second-step application to the General Foreman, and the third step application to "representaives of Management". (35a-36a)

[11] The Company's complete decision-making control only gives way in step 4, if the grievant elects to proceed to arbitration. (36a-37a)

[12] The three-step procedure must be completed approximately thirty-five days after a grievance is filed. (35a-6a) The express provision of short-time limits for invoking the grievance procedure is common in collective bargaining agreements. See *Basic Patterns, supra* at 33.

The pendency of a grievance proceeding, like the pendency of any other form of internal appeal to employers, renders the proposed company's decision tentative and nonfinal. Where implementation of the proposed decision is postponed pending that appeal, it would be obvious that the employer's decision could not be considered final. Where the implementation of some adverse action is not deferred, the employer stands ready, if the internal appeal is resolved in favor of the employee, to vitiate the effect of that interim implementation by hiring, promoting, or compensating the employee in any appropriate manner. Whatever interim measure the employer elects during the pendency of the internal appeal does not alter the tentative nature of the initial decision on which any such action might be based. So long as the employer has not made a final decision on the dispute involved, and holds out the possibility that a future decision may produce for the employee all he seeks, the employer should not be regarded as having made the firm decision to discriminate which would commence the applicable limitation period. Cf. *Brown* v. *General Services Administration*, 44 U.S.L.W. 4704 (June 1, 1976).

If the October 25 discharge were considered as a final act which commenced the running of a limitations period, then the Personnel Director's decision on November 18 approving of the discriminatory discharge would be considered a new "occurrence" for which the limitation period would commence on that date. Petitioner in the instant case alleged that she not only was discriminatorily discharged, but also that she was not reinstated because of her race.[13] It is unlikely that the issues regarding the legality of the decision on the grievance would differ sig-

[13] She specifically alleged that a white employee in similar circumstances had been reinstated. (7a)

nificantly from those regarding the tentative decision that was the subject of the grievance proceeding. A Company has the obligation to review initial supervisory decisions to insure that the subjective discretion of its supervisors is not used in a discriminatory manner.[14] This view is consistent with cases brought to remedy unfair labor practices in which the knowledge of the supervisors concerning the union activity of a worker, and the supervisor's actions, have been readily imputed to the employer for the purpose of determining the employer's anti-union purpose.[15] *A fortiori* under Title VII, where specific intent to discriminate is not a requirement,[16] it should be inferred that the facts pertaining to a discriminatory discharge are known by a Company Manager reviewing that decision and an approval by that Manager would thereby constitute a new act of discrimination.

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[14] The Circuit Courts have regularly held that unreviewed subjective supervisory discretion is a "ready mechanism for discrimination against Blacks". *Rowe* v. *General Motors Corp.*, 457 F.2d 348, 358-59 (5th Cir. 1972); *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 655 (2nd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377, 1382-83 (4th Cir. 1972) *cert. denied* 409 U.S. 982 (1972); *United States* v. *Jacksonville Terminal Company*, 451 F.2d 428, 449 (5th Cir. 1971) *cert. denied* 406 U.S. 906 (1972); *United States* v. *United Carpenters' Local 169*, 457 F.2d 210, 215 (7th Cir. 1972) *cert. denied* 409 U.S. 851 (1971); *Rogers* v. *International Paper Co.*, 510 F.2d 340, 1345-46 (8th Cir. 1975) vac. and rem. on other grounds 423 U.S. 809 (1975).

[15] See e.g., *Texas Aluminum Co.* v. *NLRB*, 435 F.2d 917, 919 (5th Cir. 1970) (supervisor's knowledge of discharged employee's union activities imputable to employer for purposes of determining whether employee's discharge resulted from employer's anti-union discrimination); see also *Irving Air-Chute Co.* v. *NLRB*, 350 F.2d 176, 179 (2nd Cir. 1965); *NLRB* v. *Jas. H. Matthews & Co.*, 156 F.2d 706, 708 (3rd Cir. 1946); *NLRB* v. *Taylor Colquitt Co.*, 140 F.2d 92, 93 (4th Cir. 1943); *NLRB* v. *Texas Independent Oil Co.*, 232 F.2d 447, 450 (9th Cir. 1956).

[16] See *Griggs* v. *Duke Power Company*, 401 U.S. 424 (1971).

The Seventh Circuit has followed this analysis: "Under this reasoning, although the incident actually 'occurred' on October 24, 1966, for limitations purposes the 'occurrence' was not completed until Moore exhausted his promptly initiated contractual remedies. We therefore hold that, with respect to the October 24, 1966, incident, the statute began to run on February 16, 1976 [the date that the third-step grievance was rejected by the Company]." *Moore* v. *Sunbeam Corporation*, 459 F.2d 811, 827 (7th Cir. 1972).[17] Other courts which have applied the doctrine of tolling, see B *infra*, have expressly reserved ruling on the question of when the period of limitation should begin to run.[18]

Because Guy's rights under the collective bargaining agreement were not terminated until the final denial of the grievance on November 18, the Company's October 25 notification of discharge is analogous to an anticipatory breach of contract. Cf. *New York L. Ins. Co.* v. *Viglas*, 297 U.S. 672, 679-82 (1936). Guy has a right under the collective bargaining agreement to continuing employment unless discharged for cause; and Guy has a similar right under Title VII not to be discharged because of her race. Moreover, the agreement, like Title VII, specifically provides protection from a discharge resulting from racial discrimination. (35a) The continuing nature of the Company's obligation to provide employment on a non-discriminatory basis is shown by the fact that Ms. Guy could be made whole by payment of backpay and benefits if the Company reversed its decision during the grievance

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[17] See also *Phillips* v. *Columbia Gas of West Virginia*, 347 F. Supp. 533, 538 (S.D. W. Va. 1972) *aff'd* w.o. op., 474 F.2d 1342 (4th Cir. 1973).

[18] *Culpepper* v. *Reynolds Metals Company*, 421 F.2d 888, 893 n.5 (5th Cir. 1970); *Malone* v. *North American Rockwell Corporation*, 457 F.2d 779, 781 n.2 (9th Cir. 1972).

process. Cf. *Sampson* v. *Murray*, 415 U.S. 61 (1971). The initial notice of discharge does not finally terminate the employer's obligation to provide continuing employment, but rather expresses an intention to terminate in the future if the initial decision is upheld during the grievance process. After the renunciation of a continuing contract by one party, the other party has an option to consider himself absolved of any future obligation and to sue immediately, or alternatively, to postpone suit until irreparable breach occurs. *Roehm* v. *Horst*, 178 U.S. 1, 19 (1900). If the person, as petitioner did, elects to wait, the statute of limitations begins to run only from the date when the irreparable breach occurs which in this case was the date of the final denial of the grievance. See *Foss-Schneider Brewing Co.* v. *Bullock*, 59 F. 83 (6th Cir. 1893) and 4 Corbin, *Contracts*, §989 and cases cited therein.

That the Company's action was not final until the completion of the grievance process is dictated by the very nature of that process, regardless of the statutory policies involved. In fact, however, the statutory policies underlying Title VII clearly support this treatment of grievance proceedings. See *infra* at 17-22.

B. The Filing of a Grievance Pursuant to a Grievance-Arbitration Clause in a Collective Bargaining Agreement Tolls the Running of the Limitation Period Under Title VII.

1. The Relevance of Statutory Purposes to the Applicability of "Tolling".

Every appellate court, with the exception of the Sixth Circuit, which has considered the question has determined that the limitation period for filing a charge with the EEOC did not run during the aggrieved person's resort to the grievance procedure, see *infra* at 21-2. These courts

held that this conclusion was consistent with the Congressional policy favoring private settlement and voluntary compliance[19] and the Congressional intention not to have the statute read in an overly technical manner so as to destroy the Title VII rights of an employee who in good faith follows his contractual remedy.[20] In ruling that the limitations period was not tolled by the petitioner's good faith resort to the grievance procedure, the Sixth Circuit did not even consider the Congressional policies supporting tolling. Rather, the Sixth Circuit held that it was precluded from such consideration by *Johnson* v. *REA*, *Alexander* v. *Gardner-Denver Company*, and *The Harrisburg*.

In *Johnson* v. *Railway Express Agency*, this Court held that the filing of a Title VII charge with the EEOC did not toll the state statute of limitations applicable to the filing of an action pursuant to 42 U.S.C. §1981. *Johnson* is distinguishable from the instant case because it was grounded on the premise that where the statute of limitations is based on state law, the tolling rules as well must be derived from state law. 421 U.S. at 463-64. The decision does not bear upon the question of the Congressional intention with regard to the propriety of tolling the limitation period under a federal statute like Title VII.[21] The

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[19] *Culpepper* v. *Reynolds Metals Company*, *supra* 421 F.2d at 888, 891-92; *Moore* v. *Sunbeam Corporation*, *supra* 459 F.2d at 826-27; *Malone* v. *North American Rockwell Corporation*, *supra* 457 F.2d at 781.

[20] See e.g., *Culpepper* v. *Reynolds Metals Company*, *supra* 421 F.2d at 891-92. Cf. *Love* v. *Pullman Co.*, *supra* 404 U.S. at 526-27.

[21] In *Johnson* the Court used its determination that the remedies under Title VII and §1981 "are separate, distinct, and independent" as the starting point, not the conclusion as did the Sixth Circuit, for analyzing whether in that particular case the statute should be tolled. The Court then examined the appropriate state law and the pertinent Congressional intention. (421 U.S. at 462-

Court in *Johnson* expressly noted the distinction between the situation before the Court in that case and one, as here, in which the limitations period is "derived" directly from a federal statute rather than by reference to state law. 421 U.S. at 466. Where the Congressional policies underlying the federal statute, as here, require that the period of limitation be tolled, *Johnson* suggests that the courts adopt a tolling rule consistent with the statutory scheme. *Id.*[22]

The Court's decision in *Alexander* rather than prohibiting tolling of the limitations period, as the Sixth Circuit suggests, supports a "tolling" rule or, alternatively, that the limitations period is considered not to commence until the completion of the grievance procedure. *Alexander* holds that the grievance-arbitration procedures and Title VII actions are independent only in the sense that utilization of the former does not bar use of the latter. However, Title VII and the grievance-arbitration procedure "supplement" each other in achieving the national labor policy of equal employment opportunity which may best be achieved "by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause . . . and his cause

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66) The clear implication is that if the Tennessee state law or Congressional intention were otherwise, then the statute would appropriately be tolled. The Sixth Circuit because of its misinterpretation of *Johnson* wrongly thought itself precluded from examining the underlying Congressional purposes and intention in determining whether the filing of a grievance tolls the running of the limitations period.

[22] The Court expressly noted "how little is at stake" in *Johnson*, 421 U.S. at 467, n. 13. In *Guy* there is much at stake: the complementary maintenance of the essential policies of encouraging resort to the grievance-arbitration policy, voluntary compliance by unions and companies with fair employment laws, private and inexpensive settlement of equal employment disputes without resort to the federal courts, and the incorporation of fair employment practices into the law of the shop.

of action under Title VII", 415 U.S. at 59-60. See *infra* at 17-20.

The legislative intent "in this area . . . to accord parallel or overlapping remedies against discrimination", 415 U.S. at 47, requires a tolling rule that will not tend to encourage or force employees to choose between such remedies. The grievance-arbitration process provides in some instances an expeditious and inexpensive method for resolving complaints of racial discrimination,[23] but the process based on a collective-bargaining agreement and within the control of the Union and the Company is not designed for the full remedy of all claims of employment discrimination filed by individual employees.[24] 415 U.S. at 51. Combined with a tolling rule, the *Alexander* rule not barring resort to a Title VII action because of a prior election to pursue the contractual remedy will support the policies of favoring voluntary compliance and the resort to the grievance-arbitration procedure to resolve labor disputes.[25]

This Court has recently articulated the standard to be applied in order to determine whether a limitations period in a federal statute should be tolled:

> The proper test is not whether a time limitation is 'substantive' or 'procedural', but whether tolling the limitation in a given context is consonant with the

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[23] See *infra* at 18-9.

[24] Professor Edwards, in a recent study based on a questionnaire sent to arbitrators and on arbitration decisions, fully details this point. Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, Proceedings of the Twenty-Eighth Annual Meeting National Academy of Arbitrators 59, 70-84 (BNA 1975); see also Coulson, *Title Seven Arbitration in Action*, 27 Labor Law Journal 141 (1976).

[25] In addition, such a ruling will encourage Unions and Companies to incorporate the national policy of fair employment into the "law of the shop", see *infra* at 18 n.28.

> legislative scheme. (footnote omitted). *American Pipe and Construction Co.* v. *Utah,* 414 U.S. 538, 557-58 (1974).[26]

See also *Burnett* v. *New York Cent. R. Co.,* 380 U.S. 424, 426-27 (1965); *Midstate Horticultural Co.* v. *Pennsylvania R. Co.,* 320 U.S. 356, 360 (1943); see *Chase Secur. Corp.* v. *Donaldson,* 325 U.S. 304, 313-16 reh. den. 325 U.S. 896 (1945). Here the Congressional purposes supporting Title VII and the federal labor laws are clearly furthered by tolling the running of the limitations period during the period in which the worker invokes the grievance procedure.

Nor are there any equitable considerations which would weigh against a tolling rule. When the aggrieved person resorts to a grievance procedure in a constructive attempt to resolve his complaint there is neither a question that the worker has slept on his rights nor that the defendant has been prejudiced by the loss of evidence due to faded memories or the disappearance of witnesses. See *Burnett* v. *New York Cent. R. Co., supra* 380 U.S. at 428-29. In fact, because of the rapidity with which a grievance is filed, e.g., Ms. Guy filed a grievance two days after the notice of discharge, and processed, defendants will, as a general rule,

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[26] The Sixth Circuit misconstrued the scope of *The Harrisburg*. *The Harrisburg,* an *in rem* action brought under the admiralty jurisdiction of the federal court, does not apply to the facts of this case. The plaintiff sought recovery under the wrongful death statute of either Pennsylvania or Massachusetts; both statutes required the cause of action to be brought within one year. The Court simply held that litigants in federal courts who rely upon a state statute are properly bound by the limitation period contained within the state statute rather than by a federal time limit. *The Harrisburg, supra* 119 U.S. at 214. In *American Pipe and Construction Co.* v. *Utah,* 414 U.S. *supra* at 557, the Court expressly limited the holding of *The Harrisburg* (explaining that that decision did not "purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be followed".)

be informed of the complaint of discrimination earlier than if an employee only files an EEOC charge.[27]

2. *Encouragement of Voluntary Settlement of Labor Disputes.*

The decision of the Sixth Circuit, if allowed to stand, would seriously undermine the important national policy favoring conciliation and private compliance which is basic to both the fair employment and labor laws, and would unnecessarily impede implementation of this policy. In passing Title VII, Congress established "[c]ooperation and voluntary compliance . . . as the preferred means for achieving [the] goal" of providing equal employment opportunity, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44, although the federal courts are provided with final and plenary powers to enforce Title VII. *Id.* at 47. Similarly, collective bargaining and the arbitration of labor disputes is favored by federal labor laws. *United Steelworkers of America* v. *American Mfg. Co.,* 363 U.S. 564 (1960). The grievance machinery is an essential element of national labor policy because it is the "vehicle by which meaning and content are given to the collective bargaining agreement" and, as a practical matter, serves to develop the " 'common law of the shop' ". *United Steelworkers of America* v. *Warrior & Gulf Co.,* 363 U.S. 574, 581-82 (1960).

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[27] The Court has been concerned not to bar claims because of a failure to meet a limitation period where the plaintiff has been induced to pursue private settlement. *Glus* v. *Brooklyn Eastern Terminal,* 359 U.S. 231 (1959); see *Ott* v. *Midland-Ross Corporation,* 523 F.2d 1367, 1370 (6th Cir. 1975). While Guy may not have been affirmatively induced by Robbins & Myers to pursue her collective bargaining remedy, she certainly relied on the effectiveness of the agreement entered into between the Company and the Union, as those parties would want. If the limitations period is not tolled by the filing of a grievance, difficult problems concerning whether the Company and Union induced reliance on the collective bargaining agreement will have to be litigated in virtually every case.

Alexander recognized that:

> . . . the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII. 415 U.S., at 59-60.

Importantly, the Court wanted to preserve the opportunity for a continued merger of the means for enforcing the fair employment and labor policies: to encourage the incorporation of the requirements of equal opportunity in employment as developed by the federal courts pursuant to Title VII into the "common law of the shop". This incorporation would further the inexpensive, enforcement of federal law by the grievance-arbitration machinery. *Alexander, supra* at 550. *Emporium Capwell Co.* v. *Community Org.*, 420 U.S. 50, 66-7 (1975). While this desirable result has not yet been achieved, there are strong indications that considerable progress has been made under the "spur and catalyst" of Title VII. For example, there has been a steep increase between 1965 and 1974 in the inclusion of provisions in collective bargaining agreements barring discrimination on the basis of race, color, religion, sex, national origin or age and thus including such discrimination specifically within the remedial framework of the grievance-arbitration machinery.[28]

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[28] In 1974 discrimination on the basis of race, color, creed, sex, national origin or age was banned in 74% of the contracts sampled, compared to 46% in the 1970 survey and only 28% in the 1965 survey. *Basic Patterns, supra* at 127; see also Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 Univ. of Chi. L. Rev. 30, 50 (1971); Hammerman & Rogoff, *The Union Role in Title VII Enforcement*, 7 Civil Rights Digest 22, 27-28 (1975); Newman, *Post-*

The failure to defer the running of the limitations period until after the final determination of the grievance (or to toll the running of the limitation period) will seriously jeopardize any positive effect which the grievance procedure may have in providing equal employment opportunity and will jeopardize the policy of informal conciliation and voluntary compliance. A worker would be required to file an EEOC charge while attempting to pursue his collective bargaining remedy. Once an EEOC charge is filed, the informal, intra-mural nature of the grievance procedure is disturbed by the entry of a third-party, the federal government. It may then be more difficult to informally resolve the complaint. While the grievance-arbitration procedure is not sufficient for resolving all employment discrimination disputes (*Alexander*, 415 U.S. at 50-1), it may be effective for resolving many types of grievance (415 U.S. at 55), including some of the pattern and practice variety;[29] but that effectiveness will be disturbed by requiring the simultaneous pursuit of formal EEOC remedies and thus negating the primary advantage of the grievance procedure, its private and informal nature.[30] Such a result would run counter to this Court's

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Gardner Developments in the Arbitration of Discrimination Claims, Proceedings of the 28th Meeting, National Academy of Arbitrators 36 (1975).

[29] *Emporium Capwell Co.* v. *Community Org. supra* 420 U.S. at 66-67.

[30] See *Note*, 47 Miss. L. J. 545, 558-59 (1976). Similarly, the Office of the General Counsel of the NLRB has taken the position that the limitations period for filing a charge of unfair labor practice, 29 U.S.C. §160(b), is tolled pending the resort to the grievance-arbitration procedures of a collective bargaining agreement. See Memorandum from Gerald Brissman, Associate General Counsel, to William E. Youngblood, Director Region 16, dated Nov. 18, 1974 *re* Chief Freight Lines, Inc. Case Nos. 16-CA-5202, 5459, 5466, 5467 and International Brotherhood of Teamsters Local No. 886, Case No. 16-CB-833. Copies of this Memorandum,

admonition in *Alexander* that "Title VII was designed to supplement, rather than supplant, existing laws and institutions," 415 U.S. at 48-9.

3. *Avoidance of Technical Requirements.*

Guy, like many other workers, was familiar with the rules of the shop and the procedures, the grievance mechanism, for enforcing the rules. An aggrieved worker would, as a matter of course, resort to the accessible grievance machinery; only after the grievance procedure has ended and its result known is a worker likely to consider alternative available action.[31] During the informal grievance and arbitration phase an employee is unlikely to consult with counsel or learn in any other way of court-made tolling rules that might require him to complain to EOCC. It is consistent with the common-sense expectations of the shop for the Court to hold that the limitations period does not begin to run until the grievance procedure has been exhausted. To do otherwise would penalize the worker for invoking familiar contractual remedies and for not being sophisticated enough to understand the availability and suitability of alternative legal remedies.[32] Cf. *Love* v. *Pullman Co., supra*, 404 U.S. at 526-27.

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along with a transmittal letter from the General Counsel of the NLRB to counsel for petitioner, will be lodged with the Court and served on all parties.

[31] "We do not think that Congress intended for a result which would require an employee, thoroughly familiar with the rules of the shop, to proceed solely with his Title VII remedies for fear that he will waive these remedies if he follows the rule of the shop or to do both simultaneously thereby frustrating the grievance procedure". *Culpepper* v. *Reynolds Metals Co., supra* 421 F.2d at 891-92; *Moore* v. *Sunbeam Corporation, supra* 459 F.2d at 827.

[32] See Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination, supra* at 48.

4. *Tolling Is Required by the Legislative History.*

In its deliberations concerning the Equal Employment Opportunity Act of 1972, Congress surveyed the effect and interpretation which the courts had afforded Title VII. As explicitly stated by a section-by-section analysis[33] of the bill, H.R. 1746 which was reported out by the Conference Committee and which was approved by the House and the Senate,

> [i]n any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 7167, 7565 (1972).

Every appellate court which had considered the question prior to March, 1972, had held that the resort to the grievance-arbitration procedure tolled the running of the limitation period for filing a charge with the EEOC. *Culpepper* v. *Reynolds Metals Company,* 421 F.2d 888, 891-92 (5th Cir. 1970);[34] *Hutchings* v. *United States Industries,* Inc., 428 F.2d 303, 308-09 (5th Cir. 1970).[35]

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[33] The section-by-section analysis was prepared by the Senate co-sponsors of the Act, Senators Williams and Javits. Senator Williams introduced it as "an analysis of H.R. 1746 as reported from the Conference. . . ." 118 Cong. Rec. 7166 (1972). The identical section-by-section analysis was introduced into the House record by Representative Perkins, 118 Cong. Rec. 7563 (1972). The Conference Committee bill was accepted by both Chambers. *Id.* at 7170, 7573.

[34] Congress was fully aware of the decision in *Culpepper*. The decision had been cited with approval in Senate Report No. 415 at n.14-15, 92d Cong. 1st Sess. (1971).

[35] Cf. *Schiff* v. *Mead,* 3 EPD ¶8043 (6th Cir. 1970). Subsequently, every court, except the Sixth Circuit in *Guy,* has agreed that the limitations period should not run during resort to the grievance proceedings by the aggrieved person. *Moore* v. *Sunbeam*

Moreover, in keeping with its intent to make Title VII work as an effective remedy for employment discrimination and in order to encourage voluntary compliance and private settlement, Congress expressly approved those cases which had interpreted the time limitation for filing an EEOC charge "so as to give the aggrieved person the maximum benefit of the law". Section-by-section Analysis, 118 Cong. Rec. 7167, 7565 (1972). Furthermore, Congress approved a liberal judicial interpretation of a section of Title VII, §706(d), related to the section at issue, §706(e). Section 706(d) requires deferral to state fair employment agencies by the EEOC for a 60-day period. Congress approved the decision in *Love* v. *Pullman Co.*, 404 U.S. 522 (1972), which provided that the EEOC may receive and defer a charge to a state agency and then process the charge upon the lapse of the 60-day deferral period, even though the statute provides that no charge may be filed with the EEOC until 60 days after state proceedings are commenced. Congress also approved *Vigil* v. *A.T. & T.*, 455 F.2d 1222 (10th Cir. 1972), where the court held that in order to protect the aggrieved person's Title VII rights a charge filed with a state or local agency may also be filed with the EEOC during the 60-day deferral period. 118 Cong. Rec. 7167, 7565 (1972).

Corp. supra 459 F.2d at 827; *Malone* v. *North American Rockwell Corporation, supra* 457 F.2d at 781; *Sanchez* v. *Trans World Airlines, Inc.*, 499 F.2d 1107, 1108 (10th Cir. 1974); *Phillips* v. *Columbia Gas of West Virginia, Inc.*, 347 F.Supp. 533, 538 (S.D. W. Va. 1972) *aff'd* w.o. op., 474 F.2d 1342 (4th Cir. 1973); see also *Burdzell* v. *FESCO Operations*, 8 EPD ¶9676 (W.D. Penn. 1974).

II.

The 1972 Amendment to Section 706, Enlarging the Time for Filing an EEOC Charge to 180 Days, Is Applicable to This Case.

In the Equal Employment Opportunity Act of 1972 Congress extended the time period for filing a charge with the EEOC from 90 days after the allegedly discriminatory act "occurred" to 180 days.[36] Petitioner's charge was pending before the EEOC on March 24, 1972, the date the Act became effective. Since that charge was filed 108 days after petitioner was first notified of her discharge, it was clearly timely if the Act is applicable to pending cases.[37]

Under this Court's ruling in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), the 1972 amendment applies to Guy's charge.

> [A] court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary. (416 U.S. at 711)

There is no claim, nor could there be, that the application of the amendment extending the filing period to 180 days "would result in manifest injustice."

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[36] Section 4(a) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 105, 42 U.S.C. §2000e-5(e).

[37] If petitioner had filed her charge between March 24, 1972, the effective date of the 1972 Act and April 22, 1972, 180 days after the initial notice of discharge, then there would be no question that the charge was timely. Accordingly, the Sixth Circuit, by holding that petitioner's charge was untimely is penalizing her for not having undertaken the superfluous act of re-filing with EEOC on or shortly after March 24, 1972. In effect, petitioner Guy was deprived of her day in court for filing too early rather than too late. Cf. *Love* v. *Pullman Co.*, 404 U.S. 522 (1972).

Moreover, there is specific statutory direction to apply the amendment of §706 to charges pending as of the effective date of the Act.[38] Section 14 of the Act, 86 Stat. 103, 113, provides:

> The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall be applicable with respect to charges pending with the Commission on the date of enactment of this Act [March 24, 1972] and all charges filed thereafter.

The plain meaning of Section 14, that the amendments to Section 706 apply to charges pending on the effective date of the Act, was clearly what Congress intended. The initial versions of the bills introduced in both the House and the Senate provided that any amendments to Title VII would not apply to charges filed with the EEOC prior to the effective date of the Act.[39] Section 14 originated in an amendment introduced by Senator Javits; the broad reach of its intended effect was expressed by his statement that the amendment "would make whatever we do enact into law applicable to pending cases", 118 Cong. Rec. 4816 (1972). This application of the 1972 amendments was stressed in both the House and Senate.[40]

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[38] See *Davis* v. *Valley Distributing Co.*, 522 F.2d 827 (9th Cir. 1975) petition for writ of certiorari pending No. 75-836.

[39] H.R. 1746, 92d Cong., 1st Sess. §10 (1971); S. 2515, 92d Cong., 1st Sess. §13 (1971); H.R. Rep. No. 238, 92d Cong., 1st Sess. 32 (1971); S. Rep. No. 415, 92d Cong., 1st Sess. 46, 72 (1971).

[40] See 118 Cong. Rec. 7169 (1972), 118 Cong. Rec. 7567 (1972). The amendment was approved by the Senate after Senator Javits introduced it. 118 Cong. Rec. 4816 (1972). The House accepted the amendment in conference. Conference Rep. on H.R. 1746 (H.R. Rep. No. 92-899) 92d Cong. 2d Sess., 118 Cong. Rec. 6646 (1972); see also Joint Explanatory Statement of Conference Managers, 118 Cong. Rec. 6648 (1972).

This Court has applied other amendments enacted by the 1972 Act to administrative charges pending as of March 24, 1972. In *Brown* v. *GSA*, 44 U.S.L.W. 4704, (June 1, 1976), the Court affirmed the Second Circuit's ruling that Section 717 of Title VII which extended coverage to federal employees, applied to an administrative charge pending on March 24, 1972. In *Place* v. *Weinberger*, 44 U.S.L.W. 3714 (June 14, 1976), the Court vacated and remanded in light of *Brown* a decision of the Sixth Circuit which had refused to apply §717 to an administrative charge pending on March 24, 1972. Congress did not expressly provide, as it did for amended §706, that §717 should be applied to pending administrative charges. Having applied §717 to charges pending as of the effective date of the 1972 amendments the Court should, *a fortiori*, similarly apply §706.

The Sixth Circuit refused to apply the law in effect at the time of its decision because it viewed Guy's claim as having expired under the 90-day limitation period prior to February 10, 1972, the date she filed with the EEOC and therefore, it reasoned, the charge could not have been pending as of March 24, 1972 (Pet. 15a; 525 F.2d at 127). This ruling ignored the fact that the EEOC had accepted the charge on February 10, 1972, and was processing that charge until its final decision on November 20, 1973.[41] Once EEOC accepted the charge, its authority to process the charge was protected under the long-standing rule that administrative proceedings are considered pending until the

[41] EEOC accepted Guy's charge under its policy that the statutory limitation period is tolled during pendency of grievance proceedings. While EEOC has not published formal regulations on the subject, it has announced its interpretation in EEOC Decision No. 70-675, March 31, 1970, CCH EEOC Dec. 6142 (1973), CCH Emp. Prac. Rep. ¶2325.123, and EEOC Decision No. 71-687, Dec. 16, 1970, CCH EEOC Dec. ¶6186 (1973), CCH Emp. Prac. Rep. ¶2325.302.

agency renders a determination on the rights and obligations of the parties. *Marine Terminal* v. *Rederi. Transatlantic,* 400 U.S. 62, 71 (1970); *Sampson* v. *Murray,* 415 U.S. 61, 74 (1974).[42] The criterion of pendency is whether an action is in fact still under consideration in an appropriate tribunal on the date in question, not whether it should have been. Since the EEOC was clearly processing Guy's charge on March 24, the charge was pending and thereby, under the plain meaning of Section 14, the timeliness of the filing must be decided by the 180-day provision of the Equal Employment Opportunity Act of 1972.

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[42] This doctrine applies where the alleged infirmity is failure of the administrator's jurisdiction, see *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 49-50 (1938), and is therefore unaffected by the Court of Appeals' characterization of Guy's allegedly untimely filing as a jurisdictional defect. It is also consistent with the long-standing rule that jurisdiction exists for a court to issue orders, enforceable in contempt proceedings, with respect to cases before it, even if it is later determined that jurisdicion did not exist to rule on the merits. *United States* v. *United Mine Workers of America,* 330 U.S. 258, 289-95 (1947); *United States* v. *Shipp* 203 U.S. 563 (1906).

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the Court of Appeals for the Sixth Circuit should be reversed.

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FOR ARGUMENT

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1276

DORTHA ALLEN GUY,

Petitioner,

—v.—

ROBBINS & MYERS, INC.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I.

The Limitations Period Commenced to Run on November 18, 1971.

Until November 18, 1971, when the Personnel Director of the Company, Mr. Krogh, denied Petitioner Guy's appeal through the grievance procedure, the discharge of Mrs. Guy was not a final act which triggered the running of the limitations period for filing a charge with the EEOC. (Guy Brief 7-12). The October 25, 1971, initial decision to discharge Guy did not end the employer-employee contractual relationship between the petitioner and the Company. That relationship was not ended until the completion of the grievance procedure provided by Article XVIII of the collective bargaining agreement. (35a-38a).

Robbins & Myers admits that Mrs. Guy had a "right to appeal" the initial discharge decision since that decision was not final and did not terminate the contractual relationship. (Robbins & Myers Brief 32). The Company maintains that since it "implemented" that decision, i.e., removed Mrs. Guy from her job, an EEOC charge may be filed contesting that decision. The Petitioner does not disagree with the Company that the decision to discharge, whether implemented or not, like an anticipatory breach of a contract, is an act which may permit the filing of an EEOC charge. However, the Company further argues that whenever an employment decision is tentatively implemented, even though it is subject to internal Company review and may later be reversed in its entirety, that tentative implementation triggers the running of the limitations period requiring a worker to file a charge within 90 days.

This argument does not make sense. Only when the Company's act is no longer subject to a formal review as provided by the contract does it become so final as to trigger the running of the limitations period. Until then the Company may reverse its initial decision and purge its implementation of discriminatory consequences; for example, it might have done so here by reinstating Mrs. Guy with backpay. Under the Company's "date of implementation" formula, an employee would be compelled to file an EEOC charge whenever he was temporarily denied assignment, training, or other opportunity or otherwise mistreated by his immediate supervisor for what he perceived to be racial reasons. It would be necessary to file an EEOC charge even though the worker may in all likelihood obtain a remedy by filing a grievance or otherwise appealing the decision through the grievance machinery to the supervisor or personnel manager.

Until an internal appeal or grievance procedure is exhausted, a Company should not be presumed to have conclusively discriminated by the act of one of its foremen, agents or managers; rather the procedure provided by a contract for review of initial employment decision should be allowed to run its course without forcing employees to resort to Title VII procedures which are collateral to, and may well interfere with, the internal procedures of the Company. This rule conforms with the expectations of workers—the grievance procedure is a system that is routinely invoked and which often results in a Company's reversal of an initial decision. It is also consistent with Title VII's emphasis on private conciliation and voluntary compliance. *Moore* v. *Sunbeam Corporation*, 459 F.2d 811, 827 (7th Cir. 1972).

II.

The Filing of a Grievance Tolled the Running of the Limitations Period.

Robbins & Myers simplistically asserts that the "plain meaning" of the limitations period—a charge "shall be filed within ninety days after the alleged unlawful employment practices occurred"—is susceptible to only one interpretation: that the charge must be filed within the ninety-day period and that tolling or other equitable doctrines are not applicable (Robbins & Myers Brief 9). Robbins & Myers thereby concludes that the time limitation must be strictly imposed by the courts without regard to the legislative scheme or to particular factual circumstances.[1] This Court has rejected the argument that the

[1] The Company's argument by analogy to the line of cases which hold that the time for filing an action asserting a claim

enforcement of limitations periods in federal statutes should be governed by mere semantic conclusion; rather, the Court has held that federal statutes of limitations may be subject to tolling or other equitable doctrines in appropriate circumstances as dictated by the purposes of the legislative schemes. *Burnett* v. *New York Cent. R.R.*, 380 U.S. 424, 426-27 (1965); *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U.S. 356, 360 (1943).[2] When the limitations period is examined in the light of the Congressional policies established by Title VII, it is clear that the period was tolled by Mrs. Guy's resort to the grievance procedure.[3]

Robbins & Myers, in a last-line defense of the lower courts' opinion, makes factual allegations not raised in the lower courts and which are without any support in the Record: that Guy slept on her rights and/or that the Company was prejudiced by the "delay" in the filing of the claim. These are concerns to which limitation periods are normally directed. *Burnett* v. *New York Cent. R.R., supra,*

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against the United States is not tolled by resort to administrative procedures misses the point. (Robbins & Myers Brief 13-16). These cases are governed by the well-established principle "that limitations and conditions upon which the Government consents to be sued must be strictly observed and exception thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

[2] It is important to note that the limitations periods interpreted in *Burnett* ("No action shall be maintained . . . unless commenced within three years. . . .") and *Midstate Horticultural Co.* ("all actions . . . shall be begun within three years . . . and not thereafter") were as authoritative as §706(e) of Title VII. The language in §706(e) merely reflects the common standard used by the Congress to denote a limitation period and does not, by itself, indicate when, or if, tolling is appropriate.

[3] See Guy Brief 17-22; IUE Brief 29-35; U.S. Amicus Brief 26-30; *Laffey* v. *Northwest Airlines, Inc.*, No. 74-179, Slip Opinion 85-9 (D.C. Cir., Oct. 20, 1976).

380 U.S. at 428; *American Pipe & Construction Co.* v. *Utah,* 414 U.S. 538, 554-55 (1974). The Company argued below, and the lower courts held, that, as a matter of law, the filing of a grievance does not toll the limitations period. These new factual allegations, on which the record is silent and which were neither argued nor relied on below, are not now before this Court. Moreover, it is difficult to imagine how the Company was prejudiced by the fact that Guy filed a charge 108 days rather than 90 days after being informed of her discharge, especially when the Company was informed within two days of its initial decision that Guy was protesting the discharge. Similarly, the Company's assertion that Guy "has slept on her rights" is without foundation.[4] In any case, the burden rests upon the defendant to demonstrate that the tolling of the statute would in this particular situation work an injustice. *Cf. Love* v. *Pullman Co.,* 404 U.S. 522, 526 (1972); *Albemarle Paper Company* v. *Moody,* 422 U.S. 405, 424-25 (1975). Robbins & Myers has not, and could it, possibly demonstrate that it was prejudiced by Guy's filing her charge on February 10, 1972 rather than on January 22, 1972.

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[4] For example, the Company asserts that Guy, after receiving her right to sue letter, "failed to act until the last day of the ninety-day period." (Robbins & Myers Brief 23, n. 21). But the Company neglects to mention that from November 20, 1973 (when she received the right to sue letter) through February 18, 1974, she sought but could not find legal assistance. Having failed to obtain private representation, Guy went to the district court and requested appointment of counsel. The clerk of the district court referred her to the Shelby County Legal Services office; that office undertook to represent the Petitioner. (IUE Pet. 17a).

III.

The 1972 Amendment to Title VII Applies.

The legislative history of the Equal Employment Opportunity Act of 1972 makes clear that the time limitations contained in amended section 706 apply to charges filed prior to March 24, 1972. Robbins & Myers ingeniously argues that the straightforward statement in Section 14—that the 1972 amendments "shall be applicable with respect to charges pending [on March 24]"—means other than it plainly states. (Robbins & Myers Brief 39-40).

The Company's interpretation is based solely on the fact that Senator Javits, who introduced the amendment which resulted in the final form of Section 14,[5] stated that he offered the amendment because the Department of Justice requested it. 118 Cong. Rec. 4816 (1972). The Company infers that because the Justice Department's letter[6] referred to the "new enforcement authority" (the grant of authority to EEOC to institute court actions), Section 14, although sweeping in its terms, provides that only the amendment of §706 establishing the enforcement

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[5] Section 14 (initially numbered as Section 13 of S. 2515) originally read: "The amendments made by this Act to section 706 of the Civil Rights Act of 1964 shall *not* be applicable to charges filed with the Commission prior to the enactment of this Act." (Emphasis added.) Senator Javits' amendment provided that from the word "not" to the end of the section be deleted, and that the following would be inserted: "be applicable with respect to the charges pending with the Commission on the date of enactment of this Act and all charges filed thereafter." 118 Cong Rec. 4816 (1972).

[6] The letter dated February 14, 1973, and signed by David L. Norman, Assistant Attorney General, Civil Rights Division, is attached as a Supplemental Appendix to the "Brief *Amicus Curiae* of the Equal Employment Advisory Council".

authority of EEOC applies to "pending charges". This constricted interpretation is simply refuted by Senator Javits' other statements,[7] the status of the legislation at the time of the amendment,[8] and subsequent legislative history.[9]

Robbins & Myers further argues that the 1972 amendments may not be applied to Guy's charge because it was not "pending" as of March 24, the effective date of the 1972 Act. (Robbins & Myers Brief 40). This argument

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[7] Senator Javits stated that the amendment "would make whatever we do enact into law applicable to pending cases", 118 Cong. Rec. 4168 (1972); see also n. 9, *infra*.

[8] The letter sent by the Justice Department argued against the "cease and desist" authority proposed by S. 2515 for the EEOC and for a grant of authority to the EEOC to bring judicial proceedings. When Senator Javits proposed the amendment to Section 14, the Senate had in fact chosen the approach recommended by the Department of Justice. The Senate had originally intended that the cease and desist authority would *not* apply to pending charges, but that the other amendments to Section 706 (such as the expansion of the period for filing a charge from 90 to 180 days) "would cover existing charges". S. Rep. 92-415, 92d Cong., 1st Sess. 46 (1971); see also U.S. Amicus Brief 12-15. The amendment was simply intended to make the applicability of the EEOC enforcement powers consistent with other amendments to §706.

[9] The Section-by-Section analysis of the bill as reported from the Conference Committee, which was prepared by Senators Williams and Javits and considered by both houses just prior to their voting, stated "that the amended provisions of Section 706 would apply to charges filed with the Commission prior to the effective date of this Act", 118 Cong. Rec. 7169, 7567 (1972), and that the limitation period should be construed "so as to give the aggrieved person the maximum benefit of the law." (*Id.* at 7167, 7565). In view of this legislative history, there can be little question that the inclusive language of Section 14 was intended by Congress to apply, as it so states, the "amendments . . . to Section 706 [including the expansion of the 90-day limit to 180 days] . . . to charges pending with the Commission." Cf. *Davis* v. *Valley Distributing Co.*, 522 F.2d 827, 831 (9th Cir. 1976) pet. for cert. pending in No. 75-836; Guy Pet. 20a-21a.

fails on the facts; not only was the charge pending on March 24, it was investigated months later and a Determination was rendered twenty months after the effective date of the Act.[10] (IUE Pet. 17a-18a). This is not a case where the petitioner seeks to revive a claim on which a decision has been rendered and for which no timely appeal could be taken; rather, the complaint was filed approximately two years after the effective date of the 1972 amendments, and decisions in the district court and appellate court were rendered 27 and 43 months after these amendments became law. Assuredly, this is a case to which the doctrine that "a court is to apply the law in effect at the time it renders its decision" pertains. *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974).

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[10] The Company remarks that Guy listed January 29, 1972 as the most recent date on which the discrimination occurred on her EEOC charge. The Company correctly states that the Record does not state what discriminatory act she is referring to, but incorrectly asserts that EEOC "undoubtedly would not have accepted her charge as timely [if Guy had listed the chronology of the events surrounding her discharge]." Since it was the policy of the EEOC to toll the running of the 90-day limitations period during the pendency of the grievance procedures, Guy Brief 25, n. 41, the EEOC undoubtedly would have processed Guy's charge; in fact EEOC investigated the charge and did not dismiss it as untimely filed but rather rendered a decision on the merits of the claim.

IV.

The Questions Presented Are Properly Before the Court.

Finally, the Company asserts that the issues concerning when the 90-day period begins to run (whether from the Company's initial notification of Guy that she was discharged on October 25, or from the denial of her grievance on November 18) and concerning the applicability of the 1972 amendments are not before the Court because they were not presented to the lower courts.[11] Initially, the Court should note that the pertinent factual allegations are not in dispute and were presented to both the district court and the appellate court;[12] this is not a case where the petitioners are trying to present a novel argument based on facts not brought to the attention of the lower courts. Cf. *Neely* v. *Martin K. Eby Constr. Co.*, 386 U.S. 317, 320-21 (1965).

The issue as to the applicability of the 1972 amendment was fully presented to the Sixth Circuit.[13] Petitioner Guy

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[11] Robbins & Myers also asserts that Rule 40, Rules of the Supreme Court of the United States, bars the presentation of the former issue. This is incorrect; Guy directly raised this issue in her Petition for a Writ of Certiorari 2, 9-10.

[12] 6a-7a (Complaint); 16a-17a (Memorandum of Facts); 25a-26a (Answer). The lower courts relied on the undisputed facts concerning the filing, processing and denial of the grievance, Guy Pet. 1a-2a; 13a.

[13] The argument was briefed in the Sixth Circuit by the EEOC. When an amicus, and especially the federal government, raises an argument in support of the position of a party, the Court certainly has the power to consider the argument. Cf. *Blonder-Tongue Labs, Inc.* v. *University of Illinois Foundation*, 402 U.S. 373, 319 n. 6 (1971). Moreover, Petitioner Guy adopted the argument of amicus in her brief filed with the Sixth Circuit. Brief for Plaintiff-Appellant Dortha Allen Guy 23.

also raised the finality issue in the Sixth Circuit by quoting as follows from *Moore* v. *Sunbeam Corp.*, 459 F.2d 811 (7th Cir. 1972), the case primarily relied on here:

> . . . although the incident actually 'occurred' on October 24, 1966, for limitation purpose the 'occurrence' was not completed until Moore exhausted his promptly initiated contractual remedies. We therefore hold that with respect to the October 24, 1966 incident the statute began to run on February 16, 1967. 459 F.2d 811, 827. Brief for Plaintiff-Appellant Dortha Allen Guy 16.

The respondent's argument is not so much that the issues were not raised below but that petitioner has better articulated these arguments here.

Furthermore, this Court has not in the past refused to decide legal questions on which certiorari has been granted but which had not been fully briefed below. *Blonder-Tongue Labs.* v. *University of Illinois Foundation*, 402 U.S. 313, 319 n. 6 (971). *A fortiori*, when these arguments concern jurisdictional issues, which the Court has the responsibility to consider whether or not raised below, they may appropriately be presented by the parties to the Court. Cf. *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206, 209 (1963); *Liberty Mutual Insurance Co.* v. *Wetzel*, 423 U.S. 816 (1976). The Court has treated complaints as incorporating necessary factual allegations when those facts were present although defectively pled.[14] *Matthews* v. *Diaz*, 48 L.Ed. 2d 478, 487, n. 9 (1976); *Schlesinger* v. *Councilman*, 420 U.S. 738, 744, n. 9 (1975). Here the pertinent facts were presented to the lower courts and the jurisdictional basis, Title VII as amended, was properly alleged; thus

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[14] "Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts." 28 U.S.C. §1653.

theories supplementing those presented in the lower courts in support of jurisdiction may and should be considered here.

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